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In The

Supreme Court of the United States

SUNSIRAE TUNSTALL, a minor, by and through her mother, TANYA TUNSTALL, et al.,

Petitioners,

vs.

THERESA BERGESON, Superintendent of Public Instruction, et al.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Washington

PETITION FOR WRIT OF *CERTIORARI*

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192

QUESTION PRESENTED

Do the special education rights afforded to disabled students under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.*, extend to school-aged youth incarcerated in adult prisons?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

I. PETITION FOR A WRIT OF *CERTIORARI* TO THE SUPREME COURT OF WASHINGTON ... 1

II. OPINIONS BELOW 1

III. JURISDICTION 1

IV. STATUTE INVOLVED 2

V. STATEMENT OF THE CASE 4

VI. REASONS FOR GRANTING WRIT 6

A. The Washington Supreme Court's Decision Interpreting the IDEA Rewrites Federal Law and Conflicts with the Interpretations of Other Courts and that of the U.S. Department of Education 6

1. The Washington Supreme Court's Interpretation of the Pre-1997 IDEA Conflicts With Unanimous Federal Authority 8

2. The Washington Supreme Court's Construction of the 1997 Amendments to the IDEA Conflicts with Federal Authority and Will Create Confusion Among States Implementing the IDEA in Correctional Facilities 11

VII. CONCLUSION 18

TABLE OF AUTHORITIES

Page

CASES

Alexander S. v. Boyd, 876 F.Supp. 773 (D.S.C. 1995) 8

Carlisle Area Sch. v. Scott P., 62 F.2d 520 (3rd Cir. 1995) 10

Colautti v. Franklin, 439 U.S. 379 (1979) 16

Commonwealth of Virginia Department of Educ. v. Riley, 106 F.3d 559 (4th Cir. 1997) (*en banc*) 10

Dell v. Board of Education, Township High School District 113, 32 F.3d 1053 (7th Cir. 1994) 6

Doe v. Oak Park & River Forest High Sch. Dist., 115 F.3d 1273 (7th Cir. 1997) 10

Donnell C. v. Illinois State Board of Education, 829 F.Supp. 1016 (N.D. Ill. 1993) 8

Evans v. Tuttle, 613 N.E.2d 854 (Ind. Ct. App. 1993) 17

Green v. Johnson, 513 F.Supp. 965 (D. Mass. 1981) 8

Handberry v. Thompson, 92 F.Supp.2d 244 (S.D.N.Y. 2000) 15

Helms v. Independent School Dist. No. 3, 750 F.2d 820 (10th Cir. 1984), *cert. denied*, 471 U.S. 1018 (1985) 17

Mountain States Te. & Tel. Co. v. Pueblo of Santa Ana, 472 U.S. 237 (1985) 16

Paul Y. By and Through Kathy Y. v. Singletary, 979 F.Supp. 1422 (S.D. Fla. 1997) 8

Rosado v. Wyman, 397 U.S. 397 (1970) 16

State of New Hampshire v. Adams, 159 F.3d 680 (1st Cir. 1998) 8, 10

TABLE OF AUTHORITIES – Continued

Page

Tunstall, et al., v. Bergeson, et al., 141 Wash.2d 201, 5 P.3d 691 (2000) 1

Yankton Sch. Dist. v. Schramm, 93 F.3d 1369 (8th Cir. 1996) 13

STATUTES, RULES AND CONSTITUTIONAL PROVISIONS

34 C.F.R. § 300.122(a)(2)(i) 13

34 C.F.R. § 300.122(a)(2)(ii) 13

34 C.F.R. § 300.2(b)(4) 9

20 U.S.C. § 1400(d)(1)(A) 6

20 U.S.C. § 1401(8) 7

20 U.S.C. § 1401(22) 7

20 U.S.C. § 1401(25) 7

20 U.S.C. § 1412(1) (Supp. 1996) 2, 8

20 U.S.C. § 1412(2)(B) (Supp. 1996) 2, 8, 13

20 U.S.C. § 1412(a)(1)(B)(i) 3, 12, 13, 15, 16, 17

20 U.S.C. § 1412(a)(1)(B)(ii) 3, 12, 13, 15, 16

28 U.S.C. § 1257(a) 1

Education for All Handicapped Children Act, 20 U.S.C. §§ 1401-1461 (1975) 6

Individuals with Disabilities Education Act, 20 U.S.C. § 1400 (*et seq.*) 1, 2, 6

Pub. L. No. 105-17, 111 Stat. 37 (1997) 2, 11

Sup. Ct. R. 10(b) and (c) 18

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

16 EHLR 1401 (1990) 9

28 IDELR 307 (1997) 9

28 IDELR 308 (1997) 13

30 IDELR 50 (1999) 12

64 Fed. Reg. 12555 (1999) 14

143 Cong. Rec. E973 (daily ed. May 19, 1997) 15

143 Cong. Rec. S4354-02, 4375-76 (1997) 9

H. R. Rep. No. 105-95 (1997) 14

S. Rep. No. 94-168 (1975) 16

U.S. Department of Education, 21st Annual Report to Congress on the Interpretation of the Individuals with Disabilities Education Act (1999) 5, 12

I. PETITION FOR A WRIT OF *CERTIORARI* TO THE SUPREME COURT OF WASHINGTON

Petitioners, a class of school-aged incarcerated youth, request that this Court issue a writ of *certiorari* to review the judgment of the Washington Supreme Court interpreting the applicability of the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.*, to disabled youth in adult prisons.

II. OPINIONS BELOW

The opinion of the Washington Supreme Court of which review is sought was issued on July 27, 2000. This decision is reported at 141 Wash. 2d 201, 5 P. 3d 691 (2000). App. 1-51. On October 6, 2000, the Washington Supreme Court entered an Order Denying Petitioners' Motion for Reconsideration of the court's interpretation of the applicability of the IDEA in prisons. App. 83. The Washington Supreme Court's opinion was a direct review of a summary judgment entered on December 3, 1998, by the Thurston County Superior Court. App. 65-82. The trial court's summary judgment order was based on stipulated facts. App. 52-64.

III. JURISDICTION

The Washington Supreme Court's final decision was filed on October 6, 2000. This petition is timely filed. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

IV. STATUTE INVOLVED

The federal statute interpreted by the Washington Supreme Court is the Individuals with Disabilities Education Act, 20 U.S.C. § 1400, *et seq.* (IDEA). The pertinent provisions of the pre-1997 version of the IDEA are 20 U.S.C. §§ 1412(1) and 1412(2)(B) (Supp. 1996).[1] App. 84. These provide:

> In order to qualify for assistance under this subchapter in any fiscal year, a State shall demonstrate to the Secretary [of Education] that the following conditions are met:
>
> > (1) The State has in effect a policy that assures all children with disabilities the right to a free appropriate public education.

20 U.S.C. § 1412(1) (Supp. 1996).

> [A] free appropriate public education will be available for all children with disabilities between the ages of three and eighteen within the State not later than September 1, 1978, and for all children with disabilities between the ages of three and twenty-one within the State not later than September 1, 1980, except that, with respect to children with disabilities aged three to five and aged eighteen to twenty-one, inclusive, the requirements of this clause shall not be applied in any State if the application of such requirements would be inconsistent with State law or practice, or the order of any court, respecting public education within such age groups in the State[.]

20 U.S.C. § 1412(2)(B) (Supp. 1996).

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[1] The IDEA was amended in 1997. Pub. L. No. 105-17, 111 Stat. 37 (1997).

The post-1997 provisions of the IDEA involved here require States receiving federal IDEA funding to ensure:

> A free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school.
>
> (B) Limitation
>
> The obligation to make a free appropriate public education available to all children with disabilities does not apply with respect to children:
>
> (i) aged 3 through 5 and 18 through 21 in a State to the extent that its application to those children would be inconsistent with State law or practice, or the order of any court, respecting the provision of public education to children in those age ranges; and
>
> (ii) aged 18 through 21 to the extent that State law does not require that special education and related services under this subchapter be provided to children with disabilities who, in the educational placement prior to their incarceration in an adult correctional facility:
>
> (I) were not actually identified as being a child with a disability under section 1401(3) of this title; or
>
> (II) did not have an individualized education program under this subchapter.

20 U.S.C. § 1412(a)(1)(B)(i) and (ii). App. 85-86.

V. STATEMENT OF THE CASE

This class action was filed in 1997 to enforce the education rights of school-aged youth incarcerated in adult prisons in the State of Washington. The class was certified by the trial court to include disabled youth in adult prisons under the age of 22. App. 4. Disabled class members seek to enforce their rights under the IDEA to special education services to enable them to participate meaningfully in prison education programs.[2]

The state trial court dismissed Petitioners' federal special education claim, finding that the State had "no obligation under either federal statutes or the federal constitution to provide special education in prisons in Washington." App. 80. Petitioners appealed the trial court's exclusion of disabled prisoners from the benefits of the IDEA directly to the Washington Supreme Court.

In the opinion that Petitioners now ask this Court to review, the Washington Supreme Court held that prior to the 1997 amendments to the IDEA, Washington was not required by federal law to provide special education services to any youth incarcerated in state prisons. App. 30-31. The Washington Supreme Court further held that after the 1997 amendments, "the IDEA does not require the State to provide special education to persons over age 18 who are incarcerated in adult prisons." App. 30-33. On October 6, 2000, the Washington Supreme Court rejected

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[2] The case resolved questions of state law not pertinent to the issue for which Petitioners now seek review, including the right of incarcerated youth to an education under the Washington Constitution.

Petitioners' request to reconsider its interpretation of both the pre- and post-1997 versions of the IDEA. App. 83.

Among other forms of relief, class members seek compensatory education as a remedy for Washington State's failure to provide special education services to disabled school-aged youth in state prisons who are entitled to these services under federal law. Petitioners' entitlement to special education and compensatory relief arises under the IDEA prior to the 1997 amendments to that Act, as well as under the 1997 amendments now in effect.

As in other states, the population of school-aged youth in adult correctional facilities in Washington is increasing. App. 54; App. 57 (Stipulated Fact Nos. 16 and 34). In 1998, there were more than 1,000 youth under the age of 21 incarcerated in adult correctional facilities in Washington; of those, approximately 100 were under 18. App. 54 (Stipulated Fact Nos. 11 and 17). Data from the U.S. Department of Education suggest that in 1996 approximately 15,930 youth with disabilities were incarcerated in correctional facilities in the United States. App. 133, U.S. Department of Education, 21st Annual Report to Congress (1999).

VI. REASONS FOR GRANTING WRIT

A. The Washington Supreme Court's Decision Interpreting the IDEA Rewrites Federal Law and Conflicts with the Interpretations of Other Courts and that of the U.S. Department of Education.

The Washington Supreme Court's interpretation of the IDEA effectively rewrites federal law and improperly invalidates a federal statutory right to special education services that Congress granted to disabled youth.

The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400, *et seq.*, was enacted

> to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living.

20 U.S.C. § 1400(d)(1)(A).[3]

> "Special education" means
>
> specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including

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[3] Congress first enacted a comprehensive special education law in 1975 that was entitled the Education for All Handicapped Children Act. 20 U.S.C. §§ 1401-1461 (1975). The 1990 amendment substituting the new title (IDEA) involved no change in text. *Dell v. Board of Education, Township High School District 113*, 32 F.3d 1053, 1054 n. 1 (7th Cir. 1994). Washington receives federal funding under the IDEA. App. 63 (Stipulated Fact No. 52).

> (A) instruction conducted in the classroom, in the home, in hospitals *and institutions*, and in other settings[.]

20 U.S.C. § 1401(25) (emphasis added).

> "Related services" means
>
> . . . such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education[.]

20 U.S.C. § 1401(22).

> A "free appropriate public education" (FAPE) means special education and related services that –
>
> > (A) have been provided at public expense, under public supervision and direction, and without charge;
> >
> > (B) meet the standards of the State educational agency;
> >
> > (C) include an appropriate preschool, elementary, or secondary school education in the State involved; and
> >
> > (D) are provided in conformity with the individualized education program [IEP] required under section 1414(d) of this title.

20 U.S.C. § 1401(8).

1. The Washington Supreme Court's Interpretation of the Pre-1997 IDEA Conflicts With Unanimous Federal Authority.

The pre-1997 IDEA required states receiving federal funding under the statute to assure that *all* children with disabilities had a right to a free appropriate public education. 20 U.S.C. § 1412(1) (Supp. 1996) (emphasis added). The obligation to provide special education and related services to disabled students extended to disabled youth aged eighteen to twenty-one, inclusive. 20 U.S.C. § 1412(2)(B) (Supp. 1996). App. 84. Interpreting these provisions of the pre-1997 IDEA, the Washington Supreme Court erroneously held that all youth in adult prisons, regardless of age, were completely excluded from federal IDEA requirements. App. 31.

In contrast, every other court that has addressed the question whether the IDEA applies in prisons has held that a State's obligation under the pre-1997 IDEA to provide FAPE to "all children with disabilities residing in the State between the ages of 3 and 21, inclusive," extends to youth in correctional facilities. *See, e.g., State of New Hampshire v. Adams*, 159 F.3d 680, 682 (1st Cir. 1998) (assumes IDEA applies to disabled youth in adult prisons); *Paul Y. By and Through Kathy Y. v. Singletary*, 979 F. Supp. 1422, 1425 (S.D. Fla. 1997); *Alexander S. v. Boyd*, 876 F. Supp. 773, 800 (D.S.C. 1995); *Donnell C. v. Illinois State Board of Education*, 829 F. Supp. 1016, 1020 (N.D. Ill. 1993); *Green v. Johnson*, 513 F. Supp. 965, 977-78 (D. Mass. 1981) (granting preliminary injunction directing that special education be provided to all prisoners under age 22).

Moreover, federal regulations implementing the pre-1997 IDEA make clear that the special education rights granted by Congress in that statute extended to disabled youth in prison. *See* 34 C.F.R. § 300.2(b)(4) (IDEA applies to "state correctional facilities") (App. 87); *see also* 143 Cong. Rec. S4354-02, 4375-76 (1997) (remarks of Sen. Boxer regarding the pre-1997 IDEA: "the Department of Education has determined that the requirement that States provide eligible students with a free appropriate public education extends to people under age 21 convicted of felonies as adults and incarcerated in adult prisons.") (App. 126). And the U. S. Department of Education, Office of Special Education Programs (OSEP), determined that the pre-1997 IDEA applied in prisons. *See, e.g.*, 16 EHLR 1401 (1990) (states must assure that FAPE is being provided to all individuals with disabilities in adult correctional institutions) (App. 92); 28 IDELR 307 (1997) (the 1997 amendments reaffirm the IDEA's requirement to provide FAPE in adult correctional facilities) (App. 95).

Ignoring this compelling legislative history and unanimous legal authority, the Washington Supreme Court instead held:

> Based on Congress's failure to even suggest in the IDEA's text, legislative history or purpose that the IDEA applies to children incarcerated in adult facilities, we hold the pre-1997 amendment version of the IDEA did not require the State to provide special educational services to members of the inmate class.

App. 31.

To support its judicial revision of federal statutory law, the Washington Supreme Court relied on two federal court of appeals decisions, *Commonwealth of Virginia Department of Educ. v. Riley*, 106 F.3d 559, 561 (4th Cir. 1997) (*en banc*) and *Doe v. Oak Park & River Forest High Sch. Dist.*, 115 F.3d 1273, 1277-79 (7th Cir. 1997). *If* these decisions support the Washington Supreme Court's misinterpretation of federal law, they are inconsistent with the decisions of other federal courts, including the United States Court of Appeals for the First Circuit, that recognized that the pre-1997 IDEA applies to disabled incarcerated youth. *See* cases cited above at p. 8.

Petitioners, therefore, respectfully ask this Court to resolve this conflict in authority by reviewing the decision of the Washington Supreme Court that nullifies the special education rights Congress intended to grant to disabled school-aged youth incarcerated in adult correctional facilities.[4]

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[4] The Washington Supreme Court's misinterpretation of the pre-1997 version of the IDEA resulted in the denial of significant relief to which Petitioners are entitled. *See State of New Hampshire v. Adams*, 159 F.3d 680, 682 n.1 (1st Cir. 1998), *citing Carlisle Area Sch. v. Scott P.*, 62 F.3d 520, 536 (3d Cir. 1995) (educational benefits extending beyond age 21 may be granted as a remedy for violation of the right to special education under IDEA).

2. The Washington Supreme Court's Construction of the 1997 Amendments to the IDEA Conflicts with Federal Authority and Will Create Confusion Among States Implementing the IDEA in Correctional Facilities.

In 1997 Congress amended the IDEA. *See* Pub. L. No. 105-17, 111 Stat. 37 (1997). The 1997 amendments contain two exceptions to the State's duty to provide FAPE to special education students age 18 through 21, only one of which applies to youth in custody:

> The obligation to make a free appropriate public education available to all children with disabilities does not apply with respect to children:
>
> (i) aged 3 through 5 and 18 through 21 in a State to the extent that its application to those children would be inconsistent with State law or practice, or the order of any court, respecting the provision of public education to children in those age ranges; and
>
> (ii) aged 18 through 21 to the extent that State law does not require that special education and related services under this subchapter be provided to children with disabilities who, in the educational placement *prior to their incarceration in an adult correctional facility*:
>
> (I) were not actually identified as being a child with a disability under section 1401(3) of this title; or
>
> (II) did not have an individualized education program under this subchapter.

20 U.S.C. § 1412(a)(1)(B)(i) and (ii) (emphasis added). App. 85-86. The Washington Supreme Court misinterpreted these provisions to exclude *all* incarcerated disabled youth aged 18-21 from the rights and requirements of the IDEA as amended in 1997. App. 33. This construction directly conflicts with the interpretation of the 1997 amendments by the U.S. Department of Education, the federal agency responsible for enforcing the IDEA. *See* U.S. Department of Education, 21st Annual Report to Congress on the Interpretation of the Individuals With Disabilities Education Act (1999):

> [T]he IDEA Amendments of 1997 limited the State's obligation somewhat in providing special education in correctional facilities. The IDEA Amendments of 1997 revised the eligibility provisions so that States may choose not to provide special education services to youths with disabilities, ages 18 through 21, who, in the educational placement prior to their incarceration in an adult correctional facility: (a) were not actually identified as being a child with a disability under the IDEA or (b) did not have an individualized education plan (IEP) under IDEA.

App. 139-140. *See also* 30 IDELR 50 (1999) (Secretary of Education response to prison warden):

> [S]tates need only make available special education services to youth with disabilities, aged 18 through 21, who, in the educational placement prior to their incarceration in an adult correctional facility: (a) were actually identified as a child with a disability under the IDEA; or (b) had an individualized education program under the IDEA.

App. 109. As stated by the Secretary of Education:

> The IDEA Amendments of 1997, which passed Congress by large majorities of Republicans and Democrats, made it clear that all States must serve eligible youth with disabilities in adult correctional facilities. There are no provisions in the law that allow a State to elect to exclude all youth in adult facilities.

28 IDELR 308, 309. App. 104.

To justify its nullification of the federal right to special education for incarcerated youth aged 18 through 21, the Washington Supreme Court erroneously relied on the first, more general of the two exceptions in the 1997 Amendments. *See* App. 32-33 (*citing* 20 U.S.C. § 1412(a)(1)(B)(i) and *Yankton Sch. Dist. v. Schramm*, 93 F.3d 1369, 1376-77 (8th Cir. 1996) (interpreting former 20 U.S.C. § 1412 (2)(B)).[5] However, it is the second of the amendment's two exceptions (20 U.S.C. § 1412(a)(1)(B)(ii)) that specifically applies to youth in prison. Under it, states are plainly required to provide special education services to an incarcerated disabled youth aged 18 through 21 unless, in her last educational placement prior to incarceration, she was not actually identified as a child with a disability, and did not have an Individualized Education Program (IEP). 20 U.S.C. § 1412(a)(1)(B)(ii). *See also* 34 C.F.R. § 300.122(a)(2)(i) and § 300.122(a)(2)(ii) (exception to the obligation to provide FAPE after the 1997 amendments does not apply to

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[5] The language in 20 U.S.C. § 1412(a)(1)(B)(i), excluding 18-21 year olds from the IDEA if state law prohibits the use of public funds for the education of all youth in this age range, was formerly contained in 20 U.S.C. § 1412(2)(B). App. 84.

incarcerated youth who had previously received services in accordance with an IEP *or* had been identified as a child with a disability). App. 112-113.

This interpretation is further supported by the legislative history of the 1997 IDEA amendments:

> The bill provides that a State may also opt not to serve individuals who, in the educational placement prior to their incarceration in adult correctional facilities, were not actually identified as a child with a disability under section 602(3) or did not have an IEP under Part B of the Act. . . . The Committee does not intend to permit the exclusion from services under Part B of children who had been identified as children with disabilities and had received services under an IEP, but who had left school prior to their incarceration. In other words, if a child had an IEP in his or her last educational placement, the child has an IEP for purposes of this provision. *The Committee added language to make clear that children with disabilities aged 18 through 21, who did not have an IEP in their last educational setting but who had actually been identified should not be excluded from services.*

H.R. Rep. No. 105-95, p. 91 (1997), quoted at 64 Fed. Reg. 12555 (1999) (emphasis added). App. 115-116.

> Before determining that an incarcerated individual is not eligible under this part to receive Part B services, the State must make reasonable efforts to obtain and review whatever information is needed to determine that the incarcerated individual had not been identified as a child with a disability and did not have an IEP in his

> or her last educational placement prior to incarceration in an adult correctional facility.

Id. See also 143 Cong. Rec. E973 (daily ed. May 19, 1997) (remarks of Rep. Martinez):

> In ensuring compliance with the act, the appropriate education and/or prison official will have the obligation to determine if a youth entering the prison system had been previously identified as eligible for special education services. The prison officials should develop a system for making this determination that includes: interviews with each incoming youth under the age of 22 regarding prior special education participation, notice to each youth under the age of 22 regarding the special education process, and a procedure for contacting educational authorities, including those in correctional or juvenile institutions, to determine special education eligibility and to obtain prior special education records.

App. 125.

Moreover, in an opinion in direct conflict with the decision below, a federal district court has recognized that after the 1997 amendments to the IDEA, the special education rights of certain youth in prison between the ages 16 to 21 "are not trumped by incarceration." *Handberry v. Thompson*, 92 F.Supp.2d 244, 248-49 (S.D.N.Y. 2000).

The Washington Supreme Court's erroneous reliance on the first, more general exception (20 U.S.C. § 1412(a)(1)(B)(i)) – which applies to non-incarcerated youth – renders (B)(ii) – the more specific exception that

explicitly applies to special education in prisons – superfluous. If, under 20 U.S.C. § 1412(a)(1)(B)(i), a State has no duty to provide FAPE to *any* incarcerated youth, Congress would not have found it necessary to enact 20 U.S.C. § 1412(a)(1)(B)(ii), allowing states to choose not to serve *some* incarcerated youth. The Washington Supreme Court's analysis therefore violates basic principles of statutory construction enunciated by this Court. *See Rosado v. Wyman*, 397 U.S. 397, 416 (1970) ("Courts should construe all legislative enactments to give them some meaning"); *Mountain States Te. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985) ("a statute should be interpreted so as not to render one part inoperative"), *quoting Colautti v. Franklin*, 439 U.S. 379, 392 (1979).

Even if the first, more general exception did apply, the Washington Supreme Court's interpretation of it is inconsistent with that of the United States Court of Appeals for the Tenth Circuit and every other court since the identical exception first appeared in the IDEA in 1975. The legislative history of the predecessor provisions of 20 U.S.C. § 1412(a)(1)(B)(i) also make it clear that the Washington Supreme Court's interpretation is incorrect. *See* S. Rep. No. 94-168 (1975) (the 18-21 year old general IDEA exception applies only "where state law does not authorize, or expressly prohibits, the expenditure of public funds to provide such an education to *any children in these age groups.*" (emphasis added)). App. 121. Conversely, "[t]his exception shall not apply . . . where a state does now in fact provide or assure the provision of free public education to non-handicapped children in these age

groups." *Id.*[6] *See also, Helms v. Independent School Dist. No. 3*, 750 F.2d 820, 823 (10th Cir. 1984), *cert. denied*, 471 U.S. 1018 (1985):

> Since non-handicapped children [aged 18-21] may be entitled to free public education, the school district may not be heard to say that Oklahoma 'State law or practice . . . respecting public education within such age groups in the State' is inconsistent with Sec. 1412(2)(B)'s [now § 1412(a)(1)(A)] requirement that a 'free appropriate public education' be made available to handicapped children within such age groups.

Accord, Evans v. Tuttle, 613 N.E.2d 854, 861 (Ind. Ct. App. 1993) ("So long as the State of Indiana continues to provide education to non-disabled children over the age of 18, it must also provide education to disabled children of the same age") (permanently enjoining state from denying special education to disabled children aged 18-21). Thus, while 20 U.S.C. § 1412(a)(1)(B)(i) may allow a state to make a decision that it will not provide education to *anyone* over 18, either disabled or non-disabled, it does not allow a state to single out a specific population such as students in adult prison and cut off education rights at 18 to them only.

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[6] Disabled youth in Washington between the ages of 5 and 22 who are not in prison receive special education and related services. App. 62 (Stipulated Fact No. 49). Non-disabled, non-incarcerated youth are entitled to basic education up to age 21. *Id.* (Stipulated Fact No. 48).

VII. CONCLUSION

The holding of the Washington Supreme Court conflicts with the interpretation of the IDEA by the United States Department of Education and two federal circuit courts. These conflicting interpretations will create significant confusion for other jurisdictions as they implement the IDEA in correctional facilities. The holding by the state court below also nullifies important federal rights that Congress recently and deliberately chose to confer. For these reasons, Petitioners respectfully ask this Court to grant this Petition for Writ of *Certiorari* to the Washington Supreme Court and decide the applicability of the IDEA to disabled youth incarcerated in adult prisons. *See* Sup. Ct. R. 10(b) and (c).

Respectfully submitted,

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APPENDIX INDEX

		Page
Appendix A	– *Tunstall v. Bergeson*, 141 Wash.2d 201 (2000)	App. 1
Appendix B	– Stipulated Facts	App. 52
Appendix C	– Thurston County Superior Court Final Order	App. 65
Appendix D	– Washington Supreme Court Order Denying Reconsideration	App. 83
Appendix E	– 20 U.S.C. § 1412(1) and (2)(B) (Supp. 1996)	App. 84
Appendix F	– 20 U.S.C. § 1412(a)(1)(B)(i) and (ii)	App. 85
Appendix G	– 34 C.F.R. § 300.2(b)(4)	App. 87
Appendix H	– 16 EHLR 1401	App. 88
Appendix I	– 28 IDELR 307	App. 94
Appendix J	– 28 IDELR 308	App. 99
Appendix K	– 30 IDELR 50	App. 108
Appendix L	– 34 C.F.R. § 300.122(a)(2)(i) and (ii)	App. 112
Appendix M	– 64 Fed. Reg. 12555 (1999)	App. 114
Appendix N	– S. Rep. No. 94-168 (1975)	App. 117
Appendix O	– 143 Cong. Rec. E973 (daily ed. May 19, 1997)	App. 124
Appendix P	– 143 Cong. Rec. S4354-02 (1997)	App. 126
Appendix Q	– Chapter II, 21st Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act, U.S. Dept. of Education, 1999	App. 131

APPENDIX A

141 Wash.2d 201 (2000)

[No. 67448-5. En Banc.]

Argued Sept. 14, 1999. Decided July 27, 2000.

SUNSIRAE TUNSTALL, ET AL., *Respondents, v.* TERESA BERGESON, *as Superintendent of Public Instruction,* ET AL., *Appellants,* SHELTON SCHOOL DISTRICT No. 309, ET AL., *Respondents.*

Christine O. Gregoire, Attorney General, and *Lisa L. Sutton, Heather Klein* and *Thomas J. Young, Assistants,* for Appellants.

Patricia J. Arthur (of *Columbia Legal Services*); *David C. Fathi; Patricia H. Wagner* and *Angela M. Niemann* (of *Heller Ehrman White & McAuliffe; William A. Coats* (of *Vandeberg Johnson & Coats*); and *Michael A. Patterson, Philip B. Grennan,* and *Karen A. Kalzer* (of *Lee, Smart, Cook, Martin & Patterson, P.S., Inc.*), for respondents.

Andrea D. Orth on behalf of American Civil Liberties Union; Arc of Washington State; The Children's Alliance; The Juvenile Law Center; Learning Disabilities Association of Washington; Northwest Women's Law Center; People First of Washington; The Sentencing Project; TeamChild; Washington Coalition of Citizens with Disabilities; Washington State Catholic Conference; Washington State Special Education Coalition; The Faculty of Western Washington University's Woodring College of Education, Department of Special Education; The Youth Law Center; Osa Coffey, Ph.D.; Barry Krisberg, Ph.D.; Peter E. Leone, Ph.D.; and Robert B. Rutherford, Jr., Ph.D, amici curiae.

IRELAND, J. – This case comes to the court on direct review from the trial court's summary judgment rulings. Plaintiffs (hereinafter "inmates"), a class of persons incarcerated in Washington State prisons who are either under 21 years of age, or disabled and under 22 years of age,

brought suit concerning their right to education against Teresa Bergeson, the Washington State Superintendent of Public Instruction, Joseph Lehman, the Secretary of Washington's Department of Corrections (together and hereinafter referred to as the "State"), and the school districts in which the prisons are located.

We hold that individuals under age 18 incarcerated in adult Washington State Department of Correction (DOC) facilities have a constitutional right to public education and that their constitutional right is satisfied by chapter 28A.193 RCW. We also hold, however, that individuals over age 18 incarcerated in DOC facilities do not have a statutory or constitutional right to public education. Furthermore, we hold that the State is not required under the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-1436, or § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a), to provide special education services to DOC inmates between 18 and 22 years of age. Finally, we hold that the school districts may contract to provide educational services to individuals over age 18 incarcerated in DOC facilities, but are not statutorily or constitutionally obligated to do so. We reserve the issue of whether there is a constitutional right to *special* education for those between 18 and 22 until we have a case where the record and briefing are adequately developed.

I.

BACKGROUND

A. Stipulated Facts

As of April 1998, there were approximately 100 offenders under the age of 18 and 1,027 offenders under

the age of 21 incarcerated in DOC facilities.[1] The number of juvenile inmates under the age of 18 is expected to rise during the next several years due to the new mandatory declination provisions passed by the Legislature in 1997. Clerk's Papers (CP) at 1678 (citing Laws of 1997, ch. 338, § 7 (E3SHB 3900)). Of the 1,027 offenders under the age of 21, approximately 209 were believed to have either a high school diploma or a general equivalency diploma (GED).

Prior to the passage of chapter 28A.193 RCW, the Office of the Superintendent of Public Instruction (OSPI) had no responsibility for educational programs in any adult prison. DOC, however, provided several educational opportunities to inmates, largely through contracts with local community colleges. DOC education programs included courses in adult basic education, GED preparation, English as a second language, vocational skills training, crime related programs, and job readiness training.

In 1998, the Legislature passed the Engrossed Substitute Senate Bill 6600. Laws of 1998, ch. 244 (codified at RCW 28A.193). This statute provides for the education of juveniles incarcerated in adult prisons. RCW 28A.193.005. RCW 28A.193.020-.030 requires OSPI to solicit proposals from educational entities to provide education to inmates under the age of 18 in Washington State prisons.

In accordance with chapter 28A.193 RCW, DOC and OSPI contracted with two school districts[2] to provide

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[1] The trial court's summary judgment rulings were based on stipulated facts.

[2] Around June of 1999, one of the school districts did not renew its contract. *See* Ex. 1, at 2 (district's resolution to not

educational services for the 1998-99 school year at the two DOC facilities in which the inmates under 18 are located.

B. Claims

Inmates brought this class action suit against the State and those school districts where DOC facilities are located. Inmates' class was certified to include:

> All individuals who are now, or who will in the future be, committed to the custody of the Washington Department of Corrections, who are allegedly denied access to *basic or special education* during that custody, and who are, during that custody, *under the age of 21, or disabled and under the age of 22.*

CP at 203-04 (emphasis added).

The inmates alleged that the State's failure to provide them with basic and special education services violated article IX of the Washington Constitution; the basic education act, chapter 28A.150 RCW; the special education act, chapter 28A.155 RCW; the federal Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400-1436, and § 504 of the Rehabilitation Act of 1973, 29 U.S.C.

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renew educational service provider contract), Mot. to Supplement the R., *Tunstall v. Bergeson*, No. 67448-5 (Wash. Supreme Ct. June 3, 1999). In September, the district was replaced by another educational service provider. *See* Ex. 2, at 2 (agreement between DOC and Special Education Services), Mot. to Supplement the R., *Tunstall v. Bergeson*, No. 67448-5 (Wash. Supreme Ct. Sept. 13, 1999).

§ 794(a); and constitutional due process and equal protection. Furthermore, the inmates alleged that recently enacted chapter 28A.193 RCW violates article IX.

C. Trial Court Decision

On stipulated facts and cross motions for summary judgment, the trial court granted summary judgment in favor of the inmates on their claims under the Washington Constitution and the basic education act. The trial court also invalidated chapter 28A.193 RCW as unconstitutional because it impermissibly limited the availability of basic education to inmates under the age of 18 and failed to provide for special educational opportunities. The trial court, however, held that the statutory and constitutional obligation to provide educational services to persons incarcerated in Washington prisons ran only to the State and dismissed the school districts. The trial court also dismissed all of the inmates' federal claims.

On appeal, as appellants and cross-respondents, the State appeals the trial court's rulings regarding the inmates' state law claims. The inmates, as respondents and cross-appellants, challenge the trial court's dismissal of the school districts and the dismissal of their federal claims. Finally, the school districts, as cross-respondents, defend their dismissal from the case. This court stayed the trial court's orders pending the outcome of this appeal.

D. Standard of Review

In reviewing an order of summary judgment, this court engages in the same inquiry as the trial court. *E.g., Reid v. Pierce County,* 136 Wn.2d 195, 201, 961 P.2d 333 (1998). Summary judgment is upheld if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *E.g., Green v. A.P.C. (American Pharm. Co.),* 136 Wn.2d 87, 94, 960 P.2d 912 (1998) (citing, inter alia, CR 56(c)). Because this case is reviewed on stipulated facts, the issues are solely questions of law and are reviewed de novo. *See Di Blasi v. City of Seattle,* 136 Wn.2d 865, 873, 969 P.2d 10 (1998) (citing case).

Where an issue may be resolved on statutory grounds, the court will avoid deciding the issue on constitutional grounds. *Senear v. Daily Journal-Am.,* 97 Wn.2d 148, 152, 641 P.2d 1180 (1982) (citing case). Therefore, we first examine whether the inmate class is entitled to basic and special education under state statutes. Second, we review the inmates' claim that they are entitled to basic and special education under the state constitution. Third, we consider the inmates' claims that the education programs for juvenile inmates act, chapter 28A.193 RCW, violates Washington's equal protection clause. Fourth, we analyze the inmates' claims under the federal statutes. Finally, we determine what obligation, if any, is imposed upon school districts to provide basic or special education to inmates.

II.

THE INMATES' STATUTORY RIGHT TO BASIC AND SPECIAL EDUCATION

When the relevant statutory provisions are properly read together and as a whole, it is clear the Legislature did not intend that the basic and special education acts apply to individuals incarcerated in DOC prisons. Consequently, we hold that the basic education act and the special education act do not apply to the inmate class.

A. The Basic Education Act, Chapter 28A.150 RCW

The inmates first argue that the plain language of the basic education act clearly "establishes an education system available to *all* students aged 5 through 21, and excluding none." Response Br. of Resp'ts at 14 (citing RCW 28A.150.220(5)) (footnote omitted).[3] Under the inmates' theory, because children incarcerated in adult prisons are not specifically exempted from the basic education act, they are covered by the act, and are thus entitled to the same education offered to all other children in Washington. We disagree.

While the basic education act does not *explicitly* exclude youths incarcerated in adult facilities, the inquiry

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[3] The relevant portion of RCW 28A.150.220(5) states that:

> Each school district's kindergarten through twelfth grade basic educational program shall be accessible to all students who are five years of age . . . and less than twenty-one years of age. . . .

does not end there. A fundamental rule of statutory construction is that the court must interpret legislation consistently with its stated goals. *Weyerhaeuser Co. v. Tri,* 117 Wn.2d 128, 140, 814 P.2d 629 (1991). Another well-established principle of statutory construction provides that apparently conflicting statutes must be reconciled to give effect to each of them. *E.g., State v. Fagalde,* 85 Wn.2d 730, 736, 539 P.2d 86 (1975); *see also Fray v. Spokane County,* 134 Wn.2d 637, 648, 952 P.2d 601 (1998) (courts avoid construing statutes in way that renders any statutory language "superfluous") (citing case).

To resolve apparent conflicts between statutes, courts generally give preference to the more specific and more recently enacted statute. *See In re Estate of Little,* 106 Wn.2d 269, 283, 721 P.2d 950 (1986) (more specific statute) (citing cases); *Morris v. Blaker,* 118 Wn.2d 133, 147, 821 P.2d 482 (1992).[4] Along these same lines, courts also consider "the sequence of all statutes relating to the same subject matter." *Department of Labor & Indus. v. Estate of MacMillan,* 117 Wn.2d 222, 229, 814 P.2d 194 (1991) (citation omitted). Based on these principles of statutory interpretation, we examine the Legislature's statutory scheme regarding education to determine whether the basic education act applies to the inmate class.

The basic education act, originally enacted in 1977, sets up a general program of education that does not specifically address the educational needs of DOC inmates. Chapter 28A.193 RCW, on the other hand, was

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[4] *Accord State v. Stackhouse,* 88 Wn. App. 963, 968, 947 P.2d 777 (1997) (citing case).

enacted in 1998 with the intent "to provide for the operation of education programs for the *department of corrections' juvenile inmates.*" RCW 28A.193.005 (emphasis added). Under chapter 28A.193 RCW, individuals up to, and potentially including, age 18 who are incarcerated in DOC facilities may participate in DOC education programs. RCW 28A.193.030(3)-(4); *see also* RCW 72.09.460(2).[5] Furthermore, the compulsory school attendance and admission law, chapter 28A.225 RCW, was amended in 1998 to specifically *exempt* individuals who are incarcerated in adult correctional facilities from mandatory school attendance. Laws of 1998, ch. 244, § 14; RCW 28A.225.010(1)(d).[6]

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[5] The relevant portion of RCW 72.09.460(2), as amended in 1998, states that:

> The [DOC] shall provide access to a program of education to all offenders who are *under the age of eighteen* and who have not met high school graduation or general equivalency diploma requirements *in accordance with chapter 28A.193 RCW.*

(Emphasis added.) *See also* Laws of 1998, ch. 244, § 10.

[6] The relevant portion of RCW 28A.225.010(1)(d) states:

> All parents in this state of any child eight years of age and under eighteen years of age shall cause such child to attend the public school of the district in which the child resides and such child shall have the responsibility to and therefore shall attend for the full time when such school may be in session *unless*:
>
> . . . .
>
> (d) The school district superintendent of the district in which the child resides shall have excused such child from attendance because the child is . . . *incarcerated in an adult correctional facility*. . . .

(Emphasis added.)

Applying the previously discussed rules of interpretation, we hold that chapters 28A.193 and 72.09 RCW, not the basic education act, apply to the inmate class. First, applying the basic education act to DOC inmates would render chapter 28A.193 RCW and portions of chapter 72.09 RCW superfluous. *See Fray*, 134 Wash. 2d at 648. Second, chapters 28A.193 and 72.09 are the more recent and far more specific statutes regarding inmate education, and thus should be given preference. *See Little*, 106 Wn.2d at 283; *Blaker*, 118 Wn.2d at 147.

Finally, as stipulated to by the parties, the new mandatory declination provisions passed in 1997 were expected to significantly increase the number of juveniles under 18 incarcerated in DOC facilities. Relying upon the sequence in which these statutes were enacted, it is reasonable to conclude that the Legislature intended the more recent statutes and amendments to address an unmet need – the education of juvenile DOC inmates. *See MacMillan*, 117 Wn.2d at 229.

In addition to their statutory construction arguments, the inmates contend that *Tommy P.*, which held that the basic education act applies to children incarcerated in juvenile detention facilities, mandates application of the basic education act to the inmate class. Response Br. of Resp'ts at 14-15 (citing *Tommy P. v. Board of County Comm'rs*, 97 Wn.2d 385, 391-93, 645 P.2d 697 (1982)).[7] The

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[7] Specifically, this court held that, "under the provisions of RCW Titles 13 and 28A, juveniles of school age have a right to education while detained in juvenile detention centers, both before and after adjudication and disposition." *Tommy P.*, 97 Wn.2d at 386.

inmates argue that *Tommy P.* stands for the proposition that children do not lose their rights to an education under the basic education act simply because they are incarcerated. Response Br. of Resp'ts at 14-15 (citing *Tommy P.*, 97 Wn.2d at 391-93). We disagree, noting at least three major flaws in the inmates' arguments.

First, contrary to inmates' assertions, the holding in *Tommy P.* does not rest on the *basic education act*; rather, it is dependent upon the compulsory attendance law's applicability to juvenile detainees. RCW 28A.27 (recodified and amended by RCW 28A.225). This court specifically held: "the *compulsory education law* requires the provision of a program of education in juvenile detention centers." *Tommy P.*, 97 Wn.2d at 398 (emphasis added).[8]

Second, as previously stated, the compulsory school attendance and admission law, upon which *Tommy P.* was based, was amended in 1998 to specifically *exclude* individuals "incarcerated in an adult correctional facility." RCW 28A.225.010(1)(d); *see also Tommy P.*, 97 Wn.2d at 394-98 (court held that, absent specific exemption, compulsory school attendance law applied to juveniles in detention facilities). Finally, *Tommy P.* involved offenders

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[8] In addition to ignoring the other bases upon which the majority distinguishes *Tommy P.*, the dissent contradicts itself by correctly recognizing that *Tommy P.* "refrained" from considering the constitutional question, but then arguing that there are "[constitutional] principles underlying *Tommy P.* [that] should not be so easily abandoned." Dissent at 238. A court's decision is not constitutional in nature where the court explicitly avoided basing its decision on constitutional principles and relied on statutory grounds.

incarcerated in juvenile facilities, not youths who were declined to adult court or incarcerated in adult facilities. For these reasons we find *Tommy P.* distinguishable.

B. The Special Education Act, Chapter 28A.155 RCW

The analysis and arguments regarding whether the special education act, chapter 28A.155 RCW, applies to the inmate class parallels those regarding the basic education act above. Like the basic education act, the special education act is stated in broad terms and does not specifically address the education of juveniles in DOC facilities. The special education act's purpose is "to ensure that *all children with disabilities* as defined in RCW 28A.155.020 shall have the opportunity for an appropriate education at public expense as guaranteed to them by the Constitution of this state." RCW 28A.155.010 (emphasis added). "Children with disabilities" includes individuals between the ages of 3 and 22[9] who are:

> in school or out of school who are temporarily or permanently retarded in normal educational processes by reason of physical or mental disability, or by reason of emotional maladjustment, or by reason of other disability, and those

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[9] Regarding age, RCW 28A.155.020 specifically states:

> The superintendent of public instruction shall require each school district in the state to insure an appropriate educational opportunity for all children with disabilities between the ages of three and twenty-one, but when the twenty-first birthday occurs during the school year, the educational program may be continued until the end of that school year.

> children who have specific learning and language disabilities resulting from perceptual-motor disabilities, including problems in visual and auditory perception and integration.

RCW 28A.155.020.

In addition to not specifically *including* DOC inmates, the special education act is reasonably read as actually *excluding* them. The special education act's section titled "Superintendent of public instruction's duty and authority" states that the superintendent is, among other things, required to:

> Promulgate such rules as are necessary to implement the several provisions of [the basic and special education acts] and to ensure educational opportunities *within the common school system* for all children with disabilities who are not institutionalized.

RCW 28A.155.090(7) (emphasis added). When reasonably read, this provision excludes from the special education act children with disabilities *not* "within the common school system." If the superintendent is not responsible for ensuring the "educational opportunities" of a certain group of individuals, it is reasonable to conclude that the group is not covered by the act. Otherwise, we would have the anomalous situation where the special education act applies to a group of individuals, but instructs the superintendent, the individual in charge of implementing the act, that he or she is not responsible for educating these same individuals. Finding that the special education act creates an exception for individuals not "within the common school system," we must now determine whether the inmates fall under that exception.

The basic education act defines the "common school system" as that term is used in Title 28A RCW. *See* RCW 28A.150.020. As we have already held, individuals incarcerated in DOC facilities are not covered by the basic education act. Thus, by definition the inmate class is *outside* "the common school system." Relying on the rule of statutory construction that when similar words are used in different parts of a statute the meaning is presumed to be the same throughout, we find that the special education act's "common school system" is the same as that in the basic education act. *See State v. Akin*, 77 Wn. App. 575, 580-81, 892 P.2d 774 (1995) (citing *De Grief v. City of Seattle*, 50 Wn.2d 1, 11, 297 P.2d 940 (1956)). Consequently, we are constrained to find that the inmates are not "*within* the common school system" under the special education act, and thus fall under an exception to the act.

Based on the special education act's silence regarding DOC inmates and its exclusion of students not "within the common school system," we hold that the special education act does not apply to the inmate class. Because we do not favorably resolve the inmates' claims to basic or special education on statutory grounds, we next analyze the inmates' constitutional rights to basic and special education under article IX of the Washington Constitution. Within this next section we also determine whether chapter 28A.193 RCW is constitutional under article IX.

III.

INMATES' STATE CONSTITUTIONAL RIGHT TO BASIC AND SPECIAL EDUCATION UNDER ARTICLE IX

In resolving the issue of whether article IX requires the State to provide basic and special education to persons up to age 21 or 22 who are incarcerated in adult DOC prisons, we must first define the term "children" for purposes of article IX. We hold that "children" under article IX includes individuals up to age 18, including those children incarcerated in adult DOC facilities. Furthermore, we hold that chapter 28A.193 RCW, by establishing an educational program tailored for the special needs of juvenile DOC inmates, satisfies article IX.

A. "Children" under Article IX

Regarding the definition of "children" under article IX, our constitution provides little guidance, leaving the term undefined.[10] Consequently, we must look elsewhere for guidance.

At trial, the court held that the basic education act has defined "children" for the purposes of education, including article IX, as those persons up to age 22. The trial court noted that the Legislature "retains the right to restrict the age definition for children for educational purposes and may change their definition as they see fit."

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[10] "It is the paramount duty of the state to make ample provision for the education of all children residing within its borders, without distinction or preference on account of race, color, caste, or sex." WASH. CONST. art. IX, § 1.

CP at 2222. Accordingly, the trial court concluded that as long as the Legislature defines "children" as persons up to age 22, the State's constitutional duty to provide educational services runs to persons up to age 22 as well. CP at 2222, 2224. We disagree and find the trial court's reliance on the basic education act problematic.

First, the basic education act does not actually *define* the term "children" for purposes of article IX. The Legislature merely identifies the age group to which the statute applies. Furthermore, the statute does not actually use the term "children" as is found in article IX. *See* RCW 28A.150.220(5) (the basic education act "shall be accessible to all *students* who are five years of age . . . and less than twenty-one years of age. . . . ") (emphasis added).

Second, although the legislation declares that the basic education act *complies* with article IX, it does not declare education to age 21 or 22 is constitutionally *required. See* RCW 28A.150.200.[11] This is clearly demonstrated by the Legislature's subsequent enactment of chapter 28A.193 RCW. As with the basic education act, the Legislature found that chapter 28A.193 RCW satisfied its constitutional duty to provide an education under article IX. *See* RCW 28A.193.005.[12] However, unlike the

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[11] "The requirements of the Basic Education Act are deemed by the legislature to comply with the requirements of Article IX, section 1 of the state Constitution . . . and are adopted pursuant to Article IX, section 2 of the state Constitution. . . . " RCW 28A.150.200.

[12] The relevant portion of RCW 28A.193.005 specifically states that:

The legislature findings that this chapter fully satisfies any constitutional duty to provide education programs for juvenile

basic education act, the Legislature found that providing for the education of DOC inmates up to age 18, not 21, satisfied its constitutional duty. RCW 28A.193.030(3)-(4); RCW 72.09.460(2). We presume that if the Legislature actually intended to create a constitutional definition of "children" in the basic education act, it would have been constrained by that definition when it enacted chapter 28A.193 RCW. *See State v. Fagalde*, 85 Wn.2d 730, 736, 539 P.2d 86 (1975) (court's presume Legislature intended consistency between statutes).

Finally, even if the Legislature had explicitly defined the term "children" under article IX, its definition would not be controlling. "The ultimate power to interpret, construe and enforce the constitution of this State belongs to the judiciary." *Seattle Sch. Dist. No. 1 v. State*, 90 Wn.2d 476, 496, 585 P.2d 71 (1978) (citing cases). Having found that the basic education act does not provide the operative definition of the term "children" under article IX, we examine other statutes to determine the common understanding of the term "children" in Washington.

Under current law, only individuals *under* age 18 are required to attend school. RCW 28A.225.010 (children up to age 18 required to attend school, subject to certain exceptions). This statute supports the idea that individuals are treated like adults once they hit age 18, as *choice*

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inmates in adult correctional facilities. The legislature further finds that biennial appropriations for education programs under this chapter amply provide for any constitutional duty to educate juvenile inmates in adult correctional facilities.

is commonly recognized as a hallmark of adulthood. Furthermore, as already noted, chapter 28A.193 RCW's "definition" of children counteracts any argument that the Legislature intended to establish a child age-limit regarding education above age 18. RCW 28A.193.030(3)-(4); RCW 72.09.460(2) (act mandates that DOC inmates receive education until age 18).

Finally, although not within the education context, individuals over age 18 are generally emancipated and are able to marry without parental consent, to execute a will, to vote, to enter into a legally binding contract, to make medical decisions about their own care and those of their issue, and to sue and be sued. *See* RCW 26.28.010, .015(1)-(6) (under "Age of Majority" chapter, "all persons shall be deemed and taken to be full age for all purposes at the age of eighteen years[,]" unless otherwise provided).[13] These statutes further demonstrate that the common understanding of the definition of "children" for most purposes in Washington, including education, includes individuals up to age 18. Consequently, we hold that the term "children" under article IX includes individuals up to age 18.[14]

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[13] *See also* chapter 13.64 RCW (under "Emancipation of Minors" chapter, residents sixteen years of age or older may petition for a declaration of emancipation which would allow them "to have the power and capacity of an adult," RCW 13.64.060(1), (subject to certain exceptions).

[14] We note that the dissent mischaracterizes our statutory analysis by completely ignoring all of the other statutes we cite supporting the definition of "children" under article IX as those under age 18. *See* Dissent at 241-43 (dissent criticizes majority's reliance on RCW 26.28.015 without mentioning other statutes cited by majority).

The State raises the alternative argument that whatever statutory or constitutional rights to an education the inmates may have had, they disqualified themselves through their own criminal conduct. Specifically, the State contends that by engaging in conduct which compels their removal from the school system, the inmates have, by their own conduct and not through any failing of the State, disqualified themselves from the educational opportunities provided them.[15] We find the State's arguments unpersuasive and find it unnecessary to deal with this issue further since the Legislature has seen fit to provide an educational program to DOC inmates.

Having determined that the State is constitutionally required to provide educational services to children incarcerated in DOC facilities up to age 18, we need to determine whether the State is meeting its obligation. Consequently, we next examine chapter 28A.193 RCW to determine whether it satisfies article IX. We hold that it does.

B. Chapter 28A.193 RCW and Article IX

In determining whether chapter 28A.193 RCW satisfies article IX, we must first determine article IX's basic requirements. The inmates argue that chapter 28A.193

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[15] The State cites to language in *Seattle School District No. 1* indicating that the State may discharge its constitutional duties regarding education "only by performance unless that performance is prevented by the holder of the 'right.' " Br. of Appellants at 16 (quoting *Seattle Sch. Dist. No. 1*, 90 Wn.2d at 513).

RCW violates article IX both "on its face" and "as applied" by creating a separate and inferior system of education for persons who are incarcerated in adult prisons in Washington. Under the inmates' theory, chapter 28A.193 RCW is *presumed unconstitutional* because it interferes with a "fundamental right." *See* Br. of Resp'ts at 22. While we recognize that the State's paramount obligation to provide for basic education does not end with the establishment of a public school system, we also find the State is not obligated to provide an *identical* education to all children within the state regardless of the circumstances in which they are found.

1. The Inmates' Facial Challenge under Article IX

It is a well-established general rule that where the constitutionality of a statute is challenged, that statute is presumed constitutional and the burden is on the party challenging the statute to prove its unconstitutionality beyond a reasonable doubt. *E.g., Island County v. State,* 135 Wn.2d 141, 146-47, 955 P.2d 377 (1998) (citing cases). This "demanding standard of review" is justified because, as a co-equal branch of government that is sworn to uphold the constitution, we assume the Legislature considered the constitutionality of its enactments and afford great deference to its judgment. *See Island County,* 135 Wn.2d at 147. "Additionally, the Legislature speaks for the people and we are hesitant to strike a duly enacted statute unless fully convinced . . . that the statute violates the constitution." *Id.* (citing cases).

In addition to the above standard of review, the court's focus when addressing constitutional facial challenges is on whether the statute's language violates the constitution, not whether the statute would be unconstitutional "as applied" to the facts of a particular case. *See JJR Inc. v. City of Seattle*, 126 Wn.2d 1, 3-4, 891 P.2d 720 (1995). " '[A] facial challenge must be rejected unless there exists *no set of circumstances* in which the statute can constitutionally be applied.' "*In re Detention of Turay*, 139 Wn.2d 379, 417 n. 27, 986 P.2d 790 (1999) (quoting with approval *Ada v. Guam Soc'y of Obstetricians & Gynecologists*, 506 U.S. 1011, 1012, 113 S. Ct. 633, 121 L. Ed. 2d 564 (1992) (Scalia, J. dissenting)). The practical effect of holding a statute unconstitutional on its face is to render it " 'utterly inoperative.' " 139 Wn.2d at 417 n. 27, 986 P.2d 790. Here, to effectuate the facial challenge analysis we need to first determine what article IX requires, and then determine whether we are convinced beyond a reasonable doubt that there is no set of circumstances in which chapter 28A.193 RCW could satisfy article IX.

Article IX, section 2 clearly requires the State to create and "provide for a *general and uniform system of public schools.*" (emphasis added). We have long held that this provision imposes upon the State a fundamental duty to create a common school *system*. In *Seattle Sch. Dist. No. 1*, we held that all children in Washington "have a 'right' to be amply provided with an education[; that] 'right' is constitutionally paramount and must be achieved through a 'general and uniform system of public schools.' " 90 Wn.2d at 513, 537-38; *see also Newman v. Schlarb*, 184 Wash. 147, 153, 50 P.2d 36 (1935) (duty imposed upon Legislature to provide " 'a general and uniform system of

public schools.' ") (quoting *School Dist. v. Bryan,* 51 Wash. 498, 502, 99 P. 28 (1909)). The Legislature satisfied part of its general obligation under article IX through Title 28A RCW's "Common School Provisions," which includes the basic education act.

However, as we stated earlier, the State's constitutional duty to provide educational services does not end with the creation of a "general and uniform" school system. In addition to the requirements under article IX, section 2, the State has a "*paramount duty* . . . to make *ample provision* for the education of *all children* residing within its borders. . . . " WASH. CONST. art. IX, § 1 (emphasis added); *see also Seattle Sch. Dist. No. 1,* 90 Wn.2d at 499. Nothing in this provision, however, mandates that the education must be *identical.* We recognized as much in *Tommy P.* when we held that a different education program in juvenile detention centers might be necessary to "reasonably address special needs of juvenile offenders." 97 Wn.2d at 398.[16]

Having outlined the general requirements of article IX, the question remains whether we are convinced

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[16] As also noted in Justice Talmadge's concurrence, Concurrence at 235 n.26, there are numerous examples of how Title 28A RCW is an act flexible enough to meet the educational needs of a highly varied population. *See* RCW 28A.150.305 (suspended or expelled students may be required to attend alternative education programs, which may be operated by entities other than school districts); chapter 28A.165 RCW (remedial education under the "Learning Assistance Program"); chapter 28A.195 RCW (private schooling allowed); chapter 28A.200 RCW ("Home-Based Instruction" allowed); and RCW 28A.150.220(7) ("residential schools" allowed).

beyond a reasonable doubt that there is no set of circumstances in which chapter 28A.193 RCW could meet the constitutional minimum due under article IX. Here, the educational program outlined in chapter 28A.193 RCW:

> must provide each offender a choice of curriculum that will assist the inmate in achieving a high school diploma or general equivalency diploma. The program of education may include but not be limited to basic education, prevocational training, work ethic skills, conflict resolution counseling, substance abuse intervention, and anger management counseling. The curriculum may balance these and other rehabilitation, work and training components.

RCW 72.09.460(2). The statute also outlines the infrastructure and support services required, and the proper allocation of money received from the Legislature's biennial appropriations. RCW 28A.193.005, .050, .080.

The inmates have failed to prove beyond a reasonable doubt that chapter 28A.193 RCW violates article IX. This statute makes ample provision for educational programs designed to address the special educational and rehabilitative needs of children incarcerated in adult prisons. As we have often held, it is not this court's role to micromanage education in Washington. *See Tommy P.*, 97 Wn.2d at 398 (Legislature's need to customize education programs recognized); *Seattle Sch. Dist. No. 1*, 90 Wn.2d at 520 ("While the Legislature must *act* pursuant to the constitutional mandate to discharge its duty, the general authority to select the *means* of discharging that duty should be left to the Legislature."). Consequently, we exercise judicial restraint and hold that under article

IX's broad constitutional guidelines, chapter 28A.193 RCW is constitutional on its face. *See Seattle Sch. Dist. No. 1*, 90 Wn.2d at 518 (judiciary required to provide broad constitutional guidelines regarding education within which Legislature may work).

2. The Inmates "As Applied" Challenge under Article IX

Regarding their "as applied" challenge, the inmates argue that chapter 28A.193 RCW is unconstitutional "as implemented by the State for the 1998-99 school year." Br. of Resp't at 26-32. We disagree.

The inmates' claim demonstrates a misunderstanding of the nature of "as applied" challenges. Under an "as applied" challenge, the party challenging the statute contends that the statute, as actually applied, violated the constitution. *See Turay*, 139 Wn.2d at 417 n.27 (citing *Ada*, 506 U.S. at 1012 (Scalia, J., dissenting)). Here, the inmates fail to provide any specific facts demonstrating that the State's application of chapter 28A.193 RCW *has violated* article IX. Rather, the inmates merely speculate about constitutional problems that *could result* from RCW 28A.193's application.[17]

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[17] For example, the inmates assert that because OSPI spent five months on the bidding and contracting process for the 1998-99 school year, there is the potential that this process *could* take longer in the future and cause delays in providing educational programs. According to the inmates, these delays *would* unconstitutionally burden the prisoners' constitutional rights to an education.

Consequently, the inmates' "as applied" challenge must fail.[18]

C. Special Education and Article IX

The inmates assert that the Washington Constitution mandates that special education be provided to all children with disabilities under the age of 22. However, the inmates fail to cite any supporting legal authority for this proposition.[19] It is well established that this court will not address constitutional issues "without benefit of citation to appropriate supporting authority." *Farnam v. CRISTA Ministries*, 116 Wn.2d 659, 680, 807 P.2d 830 (1991) (citing case). Consequently, given the importance and complexity of this issue, we decline to address it here and leave the matter open for future determination upon a properly developed record.

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[18] In response to the inmates' concerns about potential gaps in coverage, and the dissent's concerns about the "competitive bidding system" allegedly created by chapter 28A.193 RCW, *see* Dissent at 244 n.29, we note that nothing in our decision prohibits a subsequent "as applied" challenge after chapter 28A.193 RCW has a more developed track record. We simply find that such conjecture and speculation is inappropriate at this time. *See Turay*, 139 Wn.2d at 417 n.28.

[19] The inmates' only citation to "authority" is their reference to a statement contained in the findings of fact and conclusions of law from a 1983 case before the Thurston County Superior Court. Unpublished opinions, however, are not proper authority on appeal. *See* RAP 10.4(h).

IV.

CHAPTER 28A.193 RCW AND WASHINGTON'S EQUAL PROTECTION CLAUSE, ARTICLE I, SECTION 12

The inmate class also argues that chapter 28A.193 RCW violates Washington's equal protection clause, article I, section 12. The inmates reiterate their argument that RCW 28A.193 infringes on a fundamental or absolute right, and thus is presumptively invalid. Under the inmates' theory, the State violates Washington's equal protection clause because it treats incarcerated youths differently from nonincarcerated youths while failing to justify the disparate treatment through a compelling state interest. We disagree and hold that under the proper equal protection analysis, chapter 28A.193 RCW does not violate Washington's equal protection clause.[20]

The first step in conducting any equal protection analysis is determining the appropriate standard of review. *Foley v. Department of Fisheries*, 119 Wn.2d 783, 789, 837 P.2d 14 (1992) (citing case). Contrary to the dissent's assertions, to apply strict scrutiny, we must first find that a fundamental right is being infringed or a suspect class is involved. *See O'Day v. King County*, 109 Wn.2d 796, 814, 749 P.2d 142 (1988); *City of Seattle v. State*, 103 Wn.2d 663, 670-71, 694 P.2d 641 (1985).

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[20] There is no need to separately address the equal protection clause under the federal constitution because it is well established that the federal and state equal protection clauses are construed identically and claims arising under their scope are considered as one issue. *State v. Manussier*, 129 Wn.2d 652, 672, 921 P.2d 473 (1996).

The dissent argues that "[w]hether the statute infringes upon a fundamental right is a legal conclusion, not a legal premise. Properly stated, the threshold question is whether 'the allegedly discriminatory classification . . . *threatens* a fundamental right.' " Dissent at 239 (quoting *State v. Shawn P.*, 122 Wn.2d 553, 560, 859 P.2d 1220 (1993)). The dissent's approach misinterprets the applicable analytical framework.

In *O'Day*, this court held that the trial court improperly applied strict scrutiny because the individual's fundamental right to free speech had "not been affected" by the statute. *O'Day*, 109 Wn.2d at 814. This court went on to hold that application of the relevant laws did not "*infringe* on any fundamental interest for the purpose of equal protection analysis." *Id.* (emphasis added) (citing case). Similarly, in *City of Seattle*, this court held its equal protection inquiry focuses on whether the relevant law "*infringes* upon or *burdens*" the individual's fundamental right. *See* 103 Wn.2d at 670-71 ("any statute which *infringes* upon or *burdens* the right to vote is subject to strict scrutiny." (emphasis added)).

It is clear from both these cases that infringement of a fundamental right *is* a legal requirement to applying strict scrutiny review. On the other hand, *impermissible* infringement – infringement of a fundamental right by an overly broad law unsupported by a compelling state interest – is an ultimate legal conclusion in an equal protection analysis. *See O'Day*, 109 Wn.2d at 814; *City of Seattle*, 103 Wn.2d at 670-71. In other words, finding an infringement of the fundamental right is a necessary predicate to determining whether that right was *impermissibly* infringed. Consequently, the applicable standard

of review depends upon whether chapter 28A.193 RCW *infringes* on the inmates' fundamental right to education.[21]

As we previously held, however, chapter 28A.193 RCW does not infringe upon an inmate's fundamental right to education under article IX. Consequently, the only alternative for applying strict scrutiny is if the statute targeted a suspect class. However, in this case neither the inmates' incarceration nor juvenile status creates a suspect class. *See In re Personal Restraint of Stanphill*, 134 Wn.2d 165, 174-75, 949 P.2d 365 (1998) (rational basis review applied to inmates' equal protection claims); *In re Boot*, 130 Wn.2d 553, 572-73, 925 P.2d 964 (1996) (rational basis review applied to juveniles' claims). In the absence of infringement of a fundamental right or involvement of a suspect class, rational basis review applies.

Under rational basis review, there is a presumption of constitutionality and a statute is upheld "unless it rests on grounds wholly irrelevant to achievement of legitimate state objectives." *Shawn P.*, 122 Wn.2d at 561. In other words, the rational basis test provides that "a statutory classification will be upheld if any conceivable state

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[21] The inmates' attempt to trigger a more stringent standard of review through the abstract invocation of a "fundamental right to education" is insufficient. Taken to its logical extreme, the inmates' argument would subject *all* legislation involving *education* to strict scrutiny; this is inconsistent with prior precedent. *See, e.g., Leonard v. City of Spokane*, 127 Wn.2d 194, 197-98, 897 P.2d 358 (1995) (this court applied presumption of constitutionality in challenge to Community Redevelopment Act's diversion of tax dollars from common schools to public improvements).

of facts reasonably justifies the classification." *Id.* at 563-64. The party challenging the legislation has the burden of proving that the classification is "purely arbitrary." *State v. Coria*, 120 Wn.2d 156, 172, 839 P.2d 890 (1992).

Under these standards, we find the Legislature's decision to treat individuals under age 18 in prison different with respect to education from individuals under age 18 who are in the normal school system completely justified. Incarcerated and nonincarcerated youths are *not* similarly situated for the purpose of education. As we have previously recognized, incarcerated children may have different educational needs and may require different training programs more appropriate to their circumstances. *See Tommy P.*, 97 Wn.2d at 398 (educational programs offered in juvenile detention facilities "should reasonably address the special needs of juvenile offenders"). Chapter 28A.193 RCW, in conjunction with RCW 72.09.460(2), allows the State to properly tailor its educational programs for members of the inmate class. We find that the State's provision of education for incarcerated children through chapter 28A.193 RCW is rationally related to the legitimate state objective of meeting the unique education needs of the inmates.

We similarly find the different treatment of individuals over age 18 who are in prison justified under the rational basis test. As detailed in our discussion of inmate rights under article IX, inmates over age 18 are not children, and thus have no fundamental right to education. While we may agree with the dissent that the Legislature *should* dedicate resources toward educating members of the inmates' class, it is not our choice and the State is

within its prerogative under the rational basis standard to prioritize its resources regarding the education of individuals over age 18.

V.

THE STATE'S DUTY UNDER THE IDEA

The inmates assert that the trial court erred in dismissing their claims under the IDEA, 20 U.S.C. §§ 1400-1436. The inmates argue that the State has a duty under the IDEA to provide special education to disabled persons under age 22 who are incarcerated in Washington State prisons and that this duty existed under the IDEA both before and after the 1997 amendments to the act. We disagree and hold that the IDEA does not require the State to provide special education services to persons over age 18 who are incarcerated in adult prisons.

The IDEA was enacted to address the special educational needs of disabled children. The act's purpose is "to assure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs. . . . " 20 U.S.C. § 1400(d)(1)(A). One goal of the IDEA is to provide comparable education to disabled students as that provided to nondisabled students. States that comply with the IDEA are entitled to federal funding to assist in the provision of a free appropriate public education to disabled children residing within the state. 20 U.S.C. § 1412. In 1997, Congress amended the IDEA to expressly require states receiving funds under the act to provide a free appropriate public education (FAPE) to children with disabilities who are

expelled or suspended from school. IDEA Amendments for 1997, Pub.L. No. 105-17, § 612, 111 Stat. 37, 60.

Contrary to the inmates' assertions, the pre-1997 amendments version of the IDEA did not require the State to provide special education to persons who have been incarcerated in adult correctional facilities for conduct wholly unrelated to their disability. *See Virginia Dep't of Educ. v. Riley*, 106 F.3d 559, 561 (4th Cir.1997) (IDEA did not apply to disabled children expelled or suspended from school); *accord Doe v. Board of Educ. of Oak Park & River Forest High Sch. Dist. 200*, 115 F.3d 1273, 1277-79 (7th Cir.1997). The *Riley* court concluded that Congress must make the state's duty clear when it conditions the receipt of federal funds upon a federal mandate. *Riley*, 106 F.3d at 561. The *Riley* court found that "neither the text of section 1412(1), the legislative history, nor the purpose of the IDEA even suggests" that Congress intended the IDEA apply to disabled children expelled from school. *Id.* at 561. The same is true regarding disabled children who are incarcerated in adult prisons. Based on Congress's failure to even suggest in the IDEA's text, legislative history or purpose that the IDEA applies to children incarcerated in adult facilities, we hold that the pre-1997 amendment version of the IDEA did not require the State provide special educational services to members of the inmate class.

Having determined that the pre-1997 amendment version of the IDEA did not apply to members of the inmate class, we examine the IDEA after the 1997 amendments. In addition to explicitly *including* disabled children who are expelled or suspended from school, the 1997 amendments contain an exception to a state's duty

to provide special educational services to disabled children. Under the exception, a state's duty to provide a FAPE to children with disabilities does not apply to (1) children aged 3 through 5 and 18 through 21 in a state where its application would be inconsistent with state law or practice; and (2) children aged 18 through 21 where state law does not require that special education related services under 20 U.S.C. § 1412(a)(1)(B) be provided to children with disabilities who, prior to their incarceration in an adult prison, (a) were not actually identified as being a child with a disability under § 1401(3) or (b) did not have an individualized education program under § 1411 et seq. 34 C.F.R. § 300.122 (citing 20 U.S.C. § 1412(a)(1)(B)).

The State argues that 20 U.S.C. § 1412(a)(1)(B)(i) relieves them of any statutory duty under the IDEA to provide special educational services to disabled children between the ages of 18 and 21 because such would be inconsistent with state law, specifically, RCW 28A.193.030(3). While the State is unable to point to cases interpreting the above exceptions to the IDEA, the State points to several cases interpreting the same language contained in a prior version of the IDEA. These cases interpreted the same language now contained in § 1412(a)(1)(B)(i) to mean that a state is not required to provide special education to persons over 18 if the state does not provide basic educational services to non-disabled students over age 18. *See Yankton Sch. Dist. v. Schramm*, 93 F.3d 1369, 1376-77 (8th Cir.1996) (interpreting former 20 U.S.C. § 1412(2)(B)); *Timms v. Metropolitan Sch. Dist.*, 722 F.2d 1310, 1313-14 (7th Cir. 1983) (interpreting same).

The inmates argue that state law, specifically RCW 28A.155, requires the State to provide special education to all children in Washington under age 22. However, as we have already held, RCW 28A.155 does not apply to students incarcerated in adult correctional facilities. Rather, chapter 28A.193 RCW is the relevant statute for juveniles incarcerated in adult facilities. Under the plain language of chapter 28A.193 RCW, the State is required to provide education only to juveniles incarcerated in adult facilities until age 18. *See* RCW 28A.193.030(3); RCW 72.09.460(2). Therefore, under the amended IDEA, the State is required to provide special education only to juveniles under age 18 as well. *See Yankton Sch. Dist.*, 93 F.3d at 1376-77; *Timms*, 722 F.2d at 1313-14.

Here, the clear language of the educational provider contracts requires that the provider of educational services at the DOC facilities "[p]rovide special education, consistent with Chapter 392-172 WAC." CP at 1697; *see also* Ex. 2, at 2 (agreement between DOC and special education services), Mot. to Supplement the R., *Tunstall v. Bergeson*, No. 67448-5 (Wash. Supreme Ct. Sept. 13, 1999). Consequently, the State is currently in full compliance with its duty under the IDEA to provide special education to disabled inmates who are under age 18. Therefore, we hold that the trial court properly dismissed the inmates' IDEA claims.

VI.

THE STATE'S DUTY UNDER § 504 OF THE REHABILITATION ACT OF 1973

The inmates also argue that the State has a duty under § 504 of the Rehabilitation Act of 1973 to ensure

that disabled children in prison receive a FAPE.[22] It has been held that a state's duty under the IDEA and § 504 may be different. However, "It is well-settled that . . . where the IDEA claims are subject to dismissal the § 504 claims based upon the same allegations, [§ 504 claims] must also be dismissed." *Doe v. Arlington County Sch. Bd.*, 41 F.Supp.2d 599, 608 (E.D.Va.1999) (citing, inter alia, *Independent Sch. Dist. No. 283 v. S.D.*, 88 F.3d 556, 562 (8th Cir. 1996)). The inmate class has not cited, and this court has not found, any cases where a court held that § 504 was violated but the IDEA was not. Consequently, we hold that compliance in this case with the IDEA constitutes compliance with § 504 of the Rehabilitation Act of 1973, and thus the trial court properly dismissed the inmates' § 504 claims.[23]

VII.

THE SCHOOL DISTRICTS' OBLIGATIONS UNDER FEDERAL AND STATE LAW

As noted above, the trial court dismissed all claims brought against the defendant school districts concluding

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[22] The relevant language at issue in 29 U.S.C. § 794(a) provides that

> No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

[23] The inmates moved for fees and costs against the State for the appeal of their federal claims. Because the inmates do not prevail on their federal claims, however, they are not entitled to an award.

that the districts are not obligated under either federal or state law to provide education in Washington State prisons. We agree.

Under RCW 28A.193.020(1)(a), the school district in which the DOC facility is located has first priority to provide inmate education. If the school district declines, the contract is then offered to the educational service district in which the DOC facility is located, and finally to other school districts, educational service districts, institutions of higher education, and private contractors. RCW 28A.193.020(1)(b)-(c). If none of these parties contracts with the State, the educational service district in which the DOC facility is located is the default provider and is required to provide the educational services. RCW 28A.193.020(2).

As school districts are "creatures of statute" and have only those powers and rights specifically granted to them by statute,[24] we must examine the relevant statutory and constitutional provisions to determine whether the districts have a statutory or constitutional duty to provide education in Washington State prisons. It is clear after examining the relevant statutory and constitutional provisions that they have no such duties.

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[24] *See Moses Lake Sch. No. 161 Dist. v. Big Bend Community College*, 81 Wn.2d 551, 556, 503 P.2d 86 (1972) ("[A] school district is a creature of the legislature. It exists solely for public purposes and may exercise only those powers expressly granted by the legislature, those necessarily implied or incident to the powers granted, and those essential to the legislature's declared purpose.") (citing cases).

The only relevant statutory reference to school districts regarding inmate education is found in chapter 28A.193 RCW. Chapter 28A.193 RCW, however, gives the districts the *authority* to provide educational services only to children incarcerated in DOC facilities and does not *obligate* the districts in any way. *See* RCW 28A.193.020, .030, .040, .060. As previously stated, the local educational service district, not the school district, is the default provider of educational services for juvenile inmates. RCW 28A.193.020(2). Furthermore, the school districts have no duty under Washington's constitution. Article IX makes no reference whatsoever to school districts.

The inmates also argue that school districts are the only entity qualified to provide educational services under article IX. This argument is clearly without merit because, as seen in many instances, the Legislature has found entities other than school districts qualified to educate our youth. In addition to chapter 28A.193 RCW, the Legislature allows for alternatives to the "common school system" such as home schooling and private schools where the school districts are not involved. *See* RCW 28A.195 ("Private Schools"); RCW 28A.200 ("Home-Based Instruction"). Consequently, we hold that the *option* of operating educational programs for inmates in the DOC facility should not be construed as a constitutional or statutory mandate.

VIII.

CONCLUSION

In sum, we hold that: (1) individuals incarcerated in DOC facilities are covered by chapter 28A.193 RCW, not

the basic education act or the special education act; (2) the term "children" as used in article IX of the Washington Constitution includes individuals up to age 18, including individuals incarcerated in DOC facilities; (3) chapter 28A.193 RCW satisfies the requirements of article IX and does not violate equal protection; (4) neither the IDEA nor § 504 of the Rehabilitation Act of 1973 is violated by the lack of special education services to DOC inmates up to age 22; and (5) the school districts are not statutorily or constitutionally obligated to provide educational services to DOC inmates.

GUY, C.J., SMITH, TALMADGE, SANDERS, JJ., and SWEENEY, J. Pro Tem., concur.

TALMADGE, J. (concurring) – I write separately to express my concern that certain loose language in *Seattle Sch. Dist. No. 1 v. State*, 90 Wn.2d 476, 585 P.2d 71 (1978), regarding the breadth of the constitutional provisions on education in article IX of the Washington Constitution, may have found full voice in the dissent.

The dissent perceives an individualized constitutional right to an education based on article IX and *Seattle Sch. District*. Dissent at 239-240. Moreover, as if that is not enough, the dissent contends this right is "fundamental." Dissent at 242. The dissent's articulation of this right is dangerously imprecise in its content and breadth.

What is the practical consequence of the dissent's individualized constitutional right to education? How does the dissent define the content of this right? Does the dissent mean to say that every child in Washington has a fundamental constitutional right to specific educational programs such as 12 years of meaningful instruction in

English, mathematics, science, social studies, foreign language, economics, the arts, physical education, computer sciences, or the like? How does the dissent measure if the individual right to education has been met? If a child in the sixth grade fails to achieve at the sixth grade level in mathematics or English, is the child's fundamental constitutional right to an education abridged?[25] If we do not assess the child's achievement of a constitutionally guaranteed education annually at each grade level, do we then wait until some other point in time, perhaps when the child graduates from high school? Or do we instead assess a child's achievement subject-by-subject? Will a cause of action lie to compel the State to pay for all necessary services to bring the child's achievement in school to this as yet undefined but constitutionally prescribed level? How will the dissent direct the Legislature to pay for such services?

The framers of Washington's Constitution had a more precise idea in mind when they addressed education. Article IX, section 1 of our Constitution states:

> **PREAMBLE.** It is the paramount duty of the state to make ample provision for the education of all children residing within its borders, without distinction or preference on account of race, color, caste, or sex.

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[25] Indeed, long-standing Washington case law forbids a private cause of action for a student's individual failure to achieve. *Camer v. Seattle Sch. Dist. No. 1*, 52 Wn.App. 531, 762 P.2d 356 (1988), *cert. denied*, 493 U.S. 873, 110 S. Ct. 204, 107 L. Ed. 2d 157 (1989).

Section 2 of that article directs the Legislature to provide an appropriate educational system in Washington.

> **PUBLIC SCHOOL SYSTEM.** The legislature shall provide for a general and uniform system of public schools. The public school system shall include common schools, and such high schools, normal schools, and technical schools as may hereafter be established. But the entire revenue derived from the common school fund and the state tax for common schools shall be exclusively applied to the support of the common schools.

The framers made clear an elected superintendent of public instruction and an elected Legislature, not the judiciary, manage Washington's educational system. WASH. CONST. art. III, § 22 (superintendent "shall have supervision over all matters pertaining to public schools, and shall perform such specific duties as may be prescribed by law"). We have said: "The state exercises its sovereign powers and fulfills its duties of providing education largely by means of a public school system under the direction and administration of the State Superintendent of Public Instruction, State Board of Education, school districts and county school boards." *Edmonds Sch. Dist. No. 15 v. City of Mountlake Terrace*, 77 Wn.2d 609, 611, 465 P.2d 177 (1970).

Our case law clearly confirms the broad power of the Legislature to define educational opportunity for Washington students by giving meaning to a "common school education." *Seattle Sch. Dist.*, 90 Wn.2d at 518-19. Moreover, the Legislature has broad discretion to define the

means of providing educational opportunity to children.[26] As early as 1935, we held the state can meet its duty under article IX by selecting any method it sees fit to organize the educational system; we upheld a cooperative

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[26] The dissent's assertion that chapter 28A.193 RCW may violate article IX because that statute allows school districts and educational service districts (ESDs) to bid for contracts to provide educational opportunities for young people in prison is plainly wrong. First, the dissent does not understand the role of educational service districts. Contrary to the dissent's view, ESDs actually do provide a variety of educational services directly to students. *See* RCW 28A.310.180 (ESDs may provide cooperative service programs, joint purchasing programs, and direct student services such as pupil transportation); RCW 28A.310.350 (core services of ESDs may include special education and transportation services, provision of learning resources, health education); RCW 28A.310.470 (superintendent of public instruction (SPI) may delegate to ESDs any program, project, or service authorized by Legislature to be performed by SPI).

Second, the dissent's interpretation of article IX's requirement of a general and uniform educational system is novel. If only a general and uniform educational system is constitutionally permissible in the dissent's view, making contracted services unconstitutional, then are parochial schools constitutionally infirm? After all, parochial schools provide educational services outside the control of school districts. *See* chapter 28A.195 RCW. How about home schooling? Home schools involve neither school districts nor schools. *See* chapter 28A.200 RCW. The dissent fails to understand Washington's diverse, pluralistic structure for the delivery of educational services.

In sum, where does the logic of the dissent's analysis lead? Is the constitutional right to a general and uniform educational system for youthful offenders only satisfied if those offenders are somehow removed from prison and placed in regular classrooms?

administrative structure for education involving state, county, and school district officers. *Newman v. Schlarb*, 184 Wash. 147, 153, 50 P.2d 36 (1935). *See also State ex rel. DuPont-Fort Lewis Sch. Dist. No. 7 v. Bruno*, 62 Wn.2d 790, 384 P.2d 608 (1963); *Edmonds Sch. Dist. No. 15*, 77 Wn.2d 609.

We have wisely chosen not to prescribe the content of an education mandated by the Washington Constitution in our earlier decisions on the scope of article IX. *See, e.g., Seattle Sch. Dist.*, 90 Wn.2d at 518, 520; *Tommy P. v. Board of County Comm'rs*, 97 Wn.2d 385, 398, 645 P.2d 697 (1982). Indeed, the content of educational opportunity changes over time, far beyond what this Court has the power to dictate. An 1889 common school education is different from such an education in 2000. For example, computer skills now critical to any contemporary Washington student were not contemplated in the agrarian Washington of 1889. This fact alone would suggest the dissent's articulation of a broad individual right goes too far.

The Washington Constitution effectively offers children in this state a constitutional right to *educational opportunity*. The state has the paramount duty to make ample provision for this opportunity in the education of its children. The Legislature's paramount duty is to define this educational opportunity in the establishment of an educational system and to fund it. Individual children, their parents, and local school districts each have standing to compel the Legislature to implement this constitutional mandate. But the courts cannot prescribe an individual right to a specific form of education.

Under a more precise formulation of the constitutional interest of children, a child should not have a right to sue for an individualized level of educational achievement in a subject or at a grade level, as the dissent would appear to permit. But if the Legislature defined a common school education and failed to fund it at the defined level, or if a school district failed to offer classes in English or mathematics at a high school, for example, when such classes were determined by the state to be compulsory for a child's graduation from high school, then an individual action might lie to compel the enforcement of the constitutional mandate.

We should be exceedingly cautious about characterizing rights as "absolute" or "fundamental," lest we arrogate to the judiciary total responsibility for running Washington's education system. That is not what our constitutional framers intended. The judiciary cannot, and should not, "constitutionalize" education in Washington so as to place the administration and the funding of education beyond the responsibility of the executive and legislative branches to whom that responsibility was *expressly* entrusted by the framers. The courts are ill-equipped to annex such a duty from the other branches and to execute the considerable responsibilities associated with it.

Because the majority's disposition of the issues in this case is in accord with the delineation of article IX of the Washington Constitution set forth here, I concur in the majority opinion.

JOHNSON, J. (dissenting) – I respectfully dissent.

The Washington State Constitution requires the State "to make ample provision for the education of all children residing within its borders. . . . " WASH. CONST. art. IX, § 1. We have long recognized this paramount constitutional duty of the State, *see Seattle Sch. Dist. No. 1 v. State*, 90 Wn.2d 476, 511-12, 585 P.2d 71 (1978), which the majority eviscerates by relying on unconvincing distinctions and irrelevant statutes. By manipulating the definition of "child," the majority denies Washington children their constitutional right to education and equal protection of the law. The trial court's decision recognized the constitutional right of children in Washington to a high school education, regardless of their criminal past. This decision is correct.

The majority loosely distinguishes *Tommy P. v. Board of County Comm'rs*, 97 Wn.2d 385, 645 P.2d 697 (1982). By drawing three unconvincing distinctions with this case, the majority disposes of respondent's argument "that *Tommy P.* stands for the proposition that children do not lose their rights to an education under the basic education act simply because they are incarcerated." Majority at 213. I disagree and would apply the approach established by *Tommy P.* to recognize the importance of this constitutional right.

The court in *Tommy P.* found that children in Washington had a statutory right to education under Title 13 RCW and Title 28A RCW. *Tommy P.*, 97 Wn.2d at 386. This court found the right to education in the specific provisions of both titles, and in the broad principles they stood for and, therefore, refrained from "considering whether the right may also be based on the United States Constitution or this state's constitution." *Tommy P.*, 97 Wn.2d at

391 (citing *Senear v. Daily Journal-Am.*, 97 Wn.2d 148, 641 P.2d 1180 (1982)). This restraint was in accord with the long-standing tradition in United States courts of avoiding constitutional questions when a decision can be based on statutory grounds. However, the principles underlying *Tommy P.* are of constitutional significance and should not be so easily abandoned.

The majority distinguishes *Tommy P.* by noting those plaintiffs were juvenile offenders, not children who had been "declined to adult court or incarcerated in adult facilities." Majority at 214. Whether an offender is a juvenile or a child declined to adult court is entirely irrelevant. By drawing this distinction, the majority deprives a child of the constitutional right to a high school education simply because he or she committed a serious crime early in life. I cannot agree with this erosion of such a significant constitutional right.

By drawing an inappropriate distinction between children on the basis of whether they have committed a crime or not, the majority compounds its error by applying an incorrect constitutional analysis. The majority applies something similar to a rational basis review in this case and ignores our constitutional duty to apply heighten [sic] scrutiny to statutes that threaten fundamental rights. The majority cites cases that are only tangentially relevant to stand for the proposition that a statute must infringe upon a fundamental right before heightened scrutiny will be applied. *See* majority at 224-26. Whether the statute infringes upon a fundamental right is a legal conclusion, not a legal premise. Properly stated, the threshold question is whether "the allegedly discriminatory classification . . . *threatens* a fundamental

right." *State v. Shawn P.*, 122 Wn.2d 553, 560, 859 P.2d 1220 (1993) (emphasis added) (citing *State v. Schaaf*, 109 Wn.2d 1, 17, 743 P.2d 240 (1987)). If the classification threatens a fundamental right, the statute is presumed *unconstitutional* and the State must establish that the statute is necessary to achieve a compelling governmental interest. *See Nielsen v. Washington State Bar Ass'n*, 90 Wn.2d 818, 820, 585 P.2d 1191 (1978). The State has failed to carry its burden.

The majority reads WASH. CONST. art. IX, § 2 as establishing a fundamental right to a "common school *system*." Majority at 221. Put another way, an individual child's right to an ample education is recharacterized as merely a duty of the State to establish a common school system. This mistakes the means for the ends and misinterprets our precedent. In *Seattle Sch. Dist. No. 1 v. State*, this court held:

> By imposing upon the State a *paramount duty* to make ample provision for the education of all children residing within the State's borders, the constitution has created a "duty" that is supreme. . . . Flowing from this constitutionally imposed "duty" is its jural correlative, a correspondent "right" permitting control of another's conduct. Therefore, all children residing within the borders of the State possess a "right," arising from the constitutionally imposed "duty" of the State, to have the State make ample provision for their education. Further, since the "duty" is characterized as *paramount* the correlative "right" has equal stature.
>
> . . . .

> Consequently, all children residing within the State's borders have a "right" to be amply provided with an education. That "right" is constitutionally paramount and must be achieved through a "general and uniform system of public schools."

Seattle Sch. Dist., 90 Wn.2d at 511-13 (footnotes omitted).

By characterizing the right as one to a "common school system," the majority confuses the constitutional right to education with the constitutional right to a common school system. As both the plain text of article IX and our precedent show, the right at issue here is the right to an education. Because that right is fundamental, *see Seattle Sch. Dist.*, 90 Wn.2d at 513, strict scrutiny applies to any law that threatens that right. *See In re Personal Restraint of Young*, 122 Wn.2d 1, 26, 857 P.2d 989 (1993).

Because the right at issue appertains to "all children residing within [Washington's] borders . . . ," WASH. CONST. art. IX, § 1, the first issue is the definition of "children." RCW 28A.150.220 of the Washington basic education act of 1977 (Basic Education Act) provides that "[e]ach school district's kindergarten through twelfth grade basic educational program shall be accessible to all students who are five years of age . . . and less than twenty-one years of age. . . . " RCW 28A.150.220(5). Through the Basic Education Act, the Legislature effectuates WASH. CONST. art. IX. *See* RCW 28A.150.200. This definition of "child" is expansive. The Legislature found it appropriate to define "child" for the purposes of article IX as any person between *five and 21 years of age*. RCW

28A.150.220(5).[27] Although the majority is correct in noting it is the duty of this court to interpret the meaning of the word "child" in article IX, majority at 218, there is no reason to reject the definition offered by the Legislature. It does not conflict with any interpretation we have already given this portion of the constitution. Nor is this a case where the Legislature has attempted to intrude upon the judicial sphere of power. *Cf. City of Boerne v. Flores*, 521 U.S. 507, 117 S. Ct. 2157, 138 L. Ed. 2d 624 (1997).

Nonetheless, the majority chooses to retool the meaning of the word "children." It holds "the common understanding" that "children" for our purposes "includes [only] individuals up to age 18." Majority at 218-19. The statutory authority cited by the majority is RCW 26.28.015, age of majority for enumerated specific purposes, *see* majority at 219, and selective miscellaneous statutes. The age at which an individual may contract, execute a will, vote, or sue is not relevant to whether he or she has a right to a high school education, and the Legislature has told us just that. Both the title of RCW 26.28.015 and the first six words of its text, "[n]otwithstanding any other provision of law . . . ," declare the legal irrelevance of other statutory definitions of "child" for the purposes of article IX, the Basic Education Act, or chapter 28A.193 RCW.

The critical flaw in the majority's analysis is shown by the fact it settles on the age of 18 as the upper limit of

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[27] RCW 28A.155.020 allows children with certain disabilities to complete the school year in which they turn age 21.

a "child." RCW 28A.193.030(3) limits the duty of a juvenile detention educator to provide education programs "for inmates under the age of eighteen. . . . " Although the majority never draws the connection, apparently it chooses 18 as the constitutional limit for childhood simply because the Legislature decided not to provide juvenile detention education for anyone older than 18. The majority's conclusion is certainly not compelled by RCW 26.28.015; that statute shows nothing more than the fact one becomes a juridical actor in Washington at the age of 18. Again, in the context of defining the scope of the constitutional right to an education, this is simply not relevant.

I would recognize the right to education is fundamental, *see Seattle Sch. Dist.*, 90 Wn.2d 476. Because that right properly appertains to individuals under 21 years of age, RCW 28A.150.220, the appropriate burden is for the State to show the statute (which threatens that right) is narrowly drawn to serve some compelling state interest. *Cf. Northshore Sch. Dist. No. 417 v. Kinnear*, 84 Wn.2d 685, 759-61, 530 P.2d 178 (1974) (Stafford, J., dissenting) (arguing that because the right to an ample education is fundamental, the State may not escape its duty to provide education regardless of whether a *compelling* interest is present).

Under this approach, the State "must establish that its classification is 'necessary to promote a *compelling* governmental interest.' Under strict scrutiny, " 'the governmental interest claimed to justify the discrimination is to be carefully examined . . . to determine whether that interest is legitimate and substantial, and . . . the means adopted to achieve the goal [must be] necessary and

precisely drawn. . . . ' " *State v. Hernandez-Mercado*, 124 Wn.2d 368, 375-76, 879 P.2d 283 (1994) (quoting *Graham v. Richardson*, 403 U.S. 365, 376, 91 S. Ct. 1848, 29 L. Ed. 2d 534 (1971) (citing *Nyquist v. Mauclet*, 432 U.S. 1, 7, 97 S. Ct. 2120, 53 L. Ed. 2d 63 (1977) (quoting *Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 605, 96 S. Ct. 2264, 49 L. Ed. 2d 65 (1976)))) (footnotes omitted). In my judgment, the State has failed to do so.

There is no compelling state interest in discriminating against 19- to 21-year-old inmates. Of course, a different answer can be reached if the interest is more broadly drawn. As a whole, the statute obviously "provide[s] for the operation of education programs for the department of corrections' juvenile inmates," RCW 28A.193.005, which is clearly a compelling governmental interest. However, whether the statute does what it says it does is not the question for us. The question is whether the State has a compelling interest in discriminating against 19- to 21-year-old juvenile inmates. It does not.

Chapter 28A.193 RCW threatens the fundamental right to an education. This statute places detention education programs on a wholly different plane than public education programs. While the classroom setting and the mechanics of bringing teachers and resources to students will obviously be different in detention than in public schools, this statute is not about those mechanics. It is about outsourcing juvenile offender education to private entities without a strong mechanism to ensure that the education will in fact be delivered and will in fact be "general and uniform," *i.e.*, equal to a public education the citizens of this state have a right to expect. The majority insists, "we have previously recognized [ ] [that]

incarcerated children may have different educational needs and may require different training programs. . . . " Majority at 227. And so we have. What the majority does not explain, and what I do not understand, is how recognition of that fact converts the commodification of juvenile offender education into a compelling interest.

Even if the State could establish a compelling interest in discriminating between the education of offenders and nonoffenders, the statute is not narrowly tailored to serve the interest asserted. There is no showing that denying education to juvenile offenders over 18 is necessary "to provide for the operation of education programs for the department of corrections' juvenile inmates." RCW 28A.193.005.

Equal protection requires that classification systems treat like people alike. *See State v. Blilie*, 132 Wn.2d 484, 493, 939 P.2d 691 (1997). Washington citizens have a right to finish high school until they are 21 or 22 years old. RCW 28A.150.220(5); RCW 28A.155.020. Incarcerated Washington residents are, however, denied the opportunity. RCW 28A.193.030(3). Instead of having until they are 21 or 22 years old to finish high school, youth in prison, who need education at least as much as those out of prison, have only until they are 18.[28] Denying an education to the very individuals who presumably most

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[28] As the majority notes, "[o]f the 1,027 offenders under the age of 21, approximately 209 were believed to have either a high school diploma or a general equivalency diploma (GED)." Majority at 207. In other words, approximately 80 percent of the offenders under the age of 21 have no high school degree.

need it bears no rational relation to any penalogical, deterrent, or rehabilitative purpose.[29]

Chapter 28A.193 RCW allows for a system that is separate and unequal and violates article IX of the Washington Constitution, by failing to provide uniform, general, and ample education for all children. I would hold that all children have the same constitutional right to a high school education, regardless of their criminal past.

MADSEN and ALEXANDER, JJ., concur with JOHNSON, J.

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[29] I am also concerned the competitive bidding system set up by RCW 28A.193.020 will not produce an education that is general and uniform. And that is precisely what WASH. CONST. art. IX requires. The statute invites any interested education provider to bid for the business of educating juvenile offenders. If no bids are received or accepted, the local educational service district is required to provide education. RCW 28A.193.020(2). However, the educational service districts have no experience in actually providing education, and there is no statutory mechanism to aid them in becoming able to provide education. As the trial court found, unless a school district is the education provider, it is unlikely the program will even have the authority to award a high school diploma. *See* Stipulated Facts 33, 36-42, 47 (Appellants' Emergency Mot. for Stay Pending Appeal, app. D). I agree. In the end, an entity with no experience in educating children and no realistic hope of gaining any, other than through trial and error, is charged with educating juvenile offenders. Most disturbing and telling of all is that education was provided at only two prisons in the 1998-1999 school year, despite the statutory requirements of chapter 28A.193 RCW. Stipulated Facts 46, 47.

APPENDIX B

SUPERIOR COURT OF WASHINGTON
IN AND FOR THURSTON COUNTY

SUNSIRAE TUNSTALL; et al., Plaintiffs, v. TERESA BERGESON, Superintendent of Public Instruction; et al., Defendants.	CLASS ACTION No. 97 2 02754 1 STIPULATED FACTS

THE PARTIES

Defendants

1. Joseph Lehman is the Secretary of the Department of Corrections (DOC). He is responsible for the administration of Washington state prisons.

2. The Department of Corrections (DOC) is a state agency organized under the laws of Washington. The DOC is responsible for the incarceration of adult convicted felons committed to prison by the superior courts of the state. The DOC also is responsible for the incarceration of juveniles convicted as adults and committed to prison pursuant to ch. 13.40 and 13.04 RCW.

3. Teresa Bergeson is the Superintendent of Public Instruction (SPI or OSPI).

4. Shelton School District No. 309 is a school district organized under the laws of the State of Washington. The Washington Corrections Center (WCC), operated by

DOC, is located in the geographic area served by the Shelton School District.

5. Peninsula School District No. 401 is a school district organized under the laws of the State of Washington. The Washington Corrections Center for Women (WCCW), operated by DOC, is located in the geographic area served by the Peninsula School District.

6. Cheney School District No. 360 is a school district organized under the laws of the State of Washington. The Airway Heights Corrections Center (AHCC), operated by DOC, is located in the geographic area served by the Cheney School District.

7. Cape Flattery School District No. 401 is a school district organized under the laws of the State of Washington. The Clallam Bay Corrections Center (CBCC), operated by DOC, is located in the geographic area served by the Cape Flattery School District.

8. Steilacoom Historical School District No. 1 is a school district organized under the laws of the State of Washington. The McNeil Island Corrections Center (MICC), operated by DOC, is located in the geographic area served by the Steilacoom School District.

9. Walla Walla School District No. 140 is a school district organized under the laws of the State of Washington. The Washington State Penitentiary (WSP), operated by DOC, is located in the geographic area served by the Walla Walla School District.

10. Monroe School District No. 103 is a school district organized under the laws of the State of Washington. The Monroe Corrections Complex (MCC), operated by

DOC, is located in the geographic area served by the Monroe School District.

Plaintiffs

11. As of April 1998, there were approximately 100 offenders incarcerated in the DOC under age 18. Of these, approximately 10 were women and 90 were men.

12. All female offenders under age 18 incarcerated in the DOC are presently housed at WCCW.

13. The DOC operates a Youthful Offender Program (YOP) at WCCW for female offenders under the age of 18.

14. All male offenders under the age of 18 are presently housed at CBCC.

15. Prior to the execution of the contracts attached hereto as Exhibits 1-4, there were youth under the age of 18 incarcerated in prisons operated by the DOC who were not being offered the opportunity to participate in a school program that can lead to the attainment of a high school diploma.

16. The DOC anticipates that the number of juvenile inmates under age 18 will increase over the next several years due to the passage in 1997 of E3SHB 3900.

17. As of April 1998, there were approximately 1,027 youth under the age of 21 incarcerated in prisons operated by the DOC.

18. Offenders aged 18-21 incarcerated in the DOC are scattered throughout DOC's facilities.

19. Since November 21, 1997, there have been and currently are youth under the age of 22 confined in every correctional facility operated by the Washington Department of Corrections (DOC).

20. In the future, youth under the age of 22 are likely to be incarcerated at any of the correctional facilities operated by the DOC.

21. There are youth who are under the age of 21 incarcerated in prisons operated by the DOC who are not offered the opportunity to participate in a school program that can lead to the attainment of a high school diploma.

DOC ADMINISTRATION

22. Offenders committed to the custody of the DOC are assigned a classification level based on their crime of conviction, their escape history, their age, and other factors. This classification level may be maximum, close, medium or minimum security. An offender's classification level, along with other factors, determines an offender's placement within the DOC. For example, an offender classified as maximum security ordinarily will be housed in a maximum security facility.

23. An offender's classification level impacts the privileges he may have while in prison. Generally, an offender classified as maximum security has fewer privileges than an offender classified as minimum security. An offender's classification level may change at any time while in prison due to his behavior or for other reasons.

24. DOC has the authority to transfer any prisoner incarcerated at MICC, WSP, CBCC, WCC, MCC, WCCW, and AHCC to another prison.

HISTORICAL FACTS

25. OSPI does not evaluate or assess school age youth in any school districts or in prisons operated by DOC for their eligibility to receive special education and related services.

26. OSPI does not provide any school age youth in any school district or in DOC prisons basic or special education and related services.

27. Because OSPI claims it has no duty to do so, OSPI has never and does not now monitor the educational programs in DOC correctional facilities.

28. Before the 1998 session of the Washington Legislature, defendant Bergeson never included funding for education programs for youth in DOC prisons in OSPI's legislative budget requests.

29. Prior to 1998, the Washington Legislature has never appropriated funds to OSPI for distribution to school districts for education programs for youth in prisons operated by DOC.

30. Defendant Bergeson has never sought funding from the Washington Legislature for the provision of basic and special education and related services to youth aged 18-22 in DOC prisons.

31. The Office of Special Education Programs (OSEP) of the United States Department of Education

conducted reviews of Washington's compliance with federal special education laws in at least 1984, 1988, and 1994.

32. Attached hereto as Exhibit 5 is a true and correct copy of a November 6, 1997 letter from Teresa Bergeson, Superintendent of Public Instruction, to Senator James West, Representative Tom Huff, and Richard Thompson, Director, Office of Financial Management, Attached hereto as Exhibit 6 is a true and correct copy of Richard Thompson's reply.

33. Historically, the DOC, through its community college contracts, provided educational programs at some institutions that led to the granting of a high-school diploma. These programs were discontinued in 1996 because of a policy decision by DOC to adopt competency-based instruction and because most offenders obtained GED certificates instead of high-school diplomas. For fiscal years 1991-96, an average of 37 high-school diplomas were awarded per year to inmates incarcerated in DOC, while for the same years an average of 567 GED certificates were awarded per year to inmates. Of the approximately 1,027 offenders incarcerated in the DOC under age 21 as of April 1998, approximately 209 were documented as having a high-school diploma or a GED.

34. Historically, the number of juveniles under age 18 incarcerated in DOC facilities was less than it is now. The number of juveniles under age 18 committed to DOC began to increase after passage in 1997 of E3SHB 3900. The 1997 Legislature appropriated approximately $4,600 per student per year to DOC for the first year, and $3,600

per student per year thereafter, to implement the education program. The appropriation under E3SHB 3900 for the second year was deleted and replaced in ESSB 6600 by the institutional funding formula for the 1998-99 school year. The Institutional Funding Formula will generate an average reimbursement of $8,415 per student per year.

35. Neither the Governor of Washington, his designee, nor any other executive official has made any designation pursuant to 20 USC § 1412(a)(11)(C) regarding the education of youth with disabilities in prisons operated by the DOC.

PROGRAMS AVAILABLE IN DOC

36. The DOC contracts with local community colleges for the provision of education services at its facilities. Through these contracts, all DOC institutions except work releases and Ahtanum View Corrections Center (AVCC) offer adult basic education (ABE) courses, General Educational Development (GED) preparation, English as a second language (ESL), vocational skills training, crime related programs, and job readiness training. At AVCC, only ABE and crime-related programs are offered. ESL is not offered at Tacoma Pre-Release or Pine Lodge Pre-Release. Larch Corrections Center and Olympic Corrections Center do not currently offer vocational skills training.

37. Adult basic education includes instruction in reading, writing, mathematics, inter-personal and problem-solving skills. GED preparation involves preparation courses for taking the GED examination in the five areas

covered by the examination: writing, social studies, science, interpreting literature and the arts, and mathematics. English as a second language courses include instruction in speaking, reading and writing skills for offenders whose primary language is a language other than English. Job readiness training includes introductory instruction in those basic skills necessary for workplace success such as industrial safety, job dynamics, and computer basics. Vocational skills training includes preparation for various occupations, including building construction/maintenance, business computers, welding, barbering, etc. Crime-related programs include courses in anger/stress management, victim awareness and similar programs.

38. The hours of instruction offered in DOC educational programs varies from institution to institution. The course offerings for vocational skills training and crime-related programs differ at the various institutions. No educational programs are offered at DOC's work release facilities. The educational provider at each institution generally is the local community college, although some job readiness programs are provided by Corrections Clearinghouse. Also, occasionally, crime-related programs are taught by DOC employees. DOC's Division of Correctional Industries provides some vocational skills courses at WCCW and AHCC. The community college providers generally do not use certificated teachers, although some teachers employed by the community colleges and utilized in DOC facilities may have teaching certificates.

39. DOC policy requires offenders under the age of 22 who do not have a GED or high-school diploma to

enroll in basic skills programming. Basic skills programming includes ESL, GED, ABE and job readiness training. Under DOC policy, if an offender in an educational program is unduly disruptive or otherwise presents a security risk, the superintendent of the institution may terminate the offender from the program.

40. All offenders committed to the custody of the DOC are received at the reception centers. The male reception center is presently at WCC and the female reception center is presently at WCCW. At each of the reception centers, offenders are tested to determine basic academic skill levels. The test administered is the Test of Adult Basic Education (TABE). The offender's education test results and education history are reviewed to determine placement in DOC educational programs. Offenders who have obtained a GED or high-school diploma who have grade level scores for basic skills less than ninth grade level may be enrolled in basis skills programs on a space available basis.

41. The DOC does not permit inmates to leave institutional grounds to attend education programs.

42. Adult basic education programs provided by community colleges in DOC prisons are designed primarily for adults age 18 and over and do not lead to a high school diploma.

ESSB 6600

43. Attached hereto as Exhibit 7 is a true and correct copy of the contract between Peninsula School District, the Office of Superintendent of Public Instruction, and

the Department of Corrections, signed on 2/2/98 to provide an education program as referenced in the contract.

44. On May 29, 1998, to implement Chapter 244 of the Laws of 1998, the SPI solicited proposals from interested agencies to provide educational services to youth under the age of 18 who are imprisoned at the WCCW and CBCC for an 11 month, 220 school day program period during the 1998-1999 school year.

45. Applicants eligible to apply to SPI to become the provider of educational services to youth under 18 at WCCW and CBCC during the 1998-1999 school year include school districts, educational services districts (ESD's), public institutions of higher education, private contractors, or any combination thereof.

46. Attached hereto as Exhibit 8 is a true and correct copy of OSPI's Request for Proposals (RFP) for education services to youth under the age of 18 who are imprisoned at CBCC and WCCW, dated May 29, 1998.

47. At all times relevant to this case, defendant school districts have not provided educational services to youth under the age of 22 incarcerated in prisons operated by Department of Corrections except:

(a) Peninsula School District contracted for services as provided in Exhibit 7;

(b) Cape Flattery and Peninsula School Districts have entered into the contracts attached as Exhibits 1 through 4.

NON-INCARCERATED STUDENTS

48. Students in Washington between the ages of 5 and 21 who are not incarcerated in a prison operated by the DOC are eligible to participate in a school program that includes the basic education program requirements that can lead to the attainment of a high school diploma pursuant to RCW 28A.150.

49. Disabled children and youth in Washington between the ages of 5 and 22 who are not incarcerated in a prison operated by the DOC are eligible to receive special education and related services if they otherwise qualify for those services.

50. The GED certificate is not the same as a high school diploma. DOC has a policy that for the purposes of prisoners age 18 and older, a GED certificate is considered the equivalent of a high school diploma.

FUNDING

51. Historically, DOC has received federal funding through the office of Superintendent of Public Instruction (SPI) under the Title I program for its adult education programs. Some of these funds are being provided to Peninsula School District and Cape Flattery School District for the 1998-99 school year pursuant to the contracts attached hereto as Exhibits 1-4. DOC also receives federal money under the basic skills program through the Office of Adult Literacy, State Board for Community and Technical Colleges. The DOC does not receive any other federal funding for education purposes.

52. OSPI receives federal funding under the Individuals with Disabilities Education Act (IDEA) and distributes some of these funds to the defendant school districts to be used for such educational programs as the law provides.

53. The Washington State Legislature has the exclusive authority to provide state funding for education in the State of Washington.

STIPULATED TO BY:

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APPENDIX C

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF THURSTON

SUNSIRAE TUNSTALL, et al., Plaintiffs, v. TERESA BERGESON, Superintendent of Public Instruction, et al., Defendants.	NO. 97-2-02754-1 **AMENDED** ORDER (1) GRANTING SUMMARY JUDGMENT TO PLAINTIFFS; (2) GRANTING SUMMARY JUDGMENT TO DEFENDANTS SCHOOL DISTRICTS; (3) DENYING SUMMARY JUDGMENT TO DEFENDANTS BERGESON AND LEHMAN; (4) GRANTING IN PART, AND DENYING IN PART, PLAINTIFFS' MOTION TO CLARIFY; (5) GRANTING PLAINTIFFS' MOTION TO RECONSIDER FEDERAL CLAIMS AND DISMISSING THOSE CLAIMS; (6) GRANTING DEFENDANTS BERGESON'S AND LEHMAN'S MOTION TO SHORTEN TIME; (7) DENYING DEFENDANTS BERGESON'S AND LEHMAN'S MOTION FOR STAY; (8) GRANTING DEFENDANTS BERGESON'S AND LEHMAN'S MOTION FOR ENTRY OF FINAL JUDGMENT

THIS MATTER having come on regularly before the Court on defendants Teresa Bergeson, Superintendent of Public Instruction's and Joseph Lehman, Secretary of Department of Corrections' motion for summary judgment and dismissal; motion to stay and motion to amend/revise judgment; motion for entry of a final judgment; and school districts' motion for summary judgment; and plaintiffs' motion for summary judgment; plaintiffs' motion to clarify Court's oral ruling of October 9, 1998; plaintiffs' motion for reconsideration of the Court's November 6, 1998 order; and plaintiffs appearing by and through their attorneys, Patricia J. Arthur, David C. Fathi, Patricia H. Wagner, and Angela Luera; defendant Teresa Bergeson, appearing by and through her attorneys, Christine O. Gregoire, Attorney General, Lisa L. Sutton, Assistant Attorney General, W. Howard Fischer, Senior Assistant Attorney General, and Robert E. Patterson, Senior Counsel, Assistant Attorney General; defendant Joseph Lehman, appearing by and through his attorney, Thomas J. Young, Assistant Attorney General; defendant Dr. H. Jerome Hansen, Superintendent, Shelton School District, appearing by and through his attorney, William A. Coats; defendants Dr. Arthur Himmler, Superintendent, Steilacoom School District; Gene R. Laes, Superintendent, Cape Flattery School District, Dr. Bill Prenevost, Superintendent, Monroe School District, Dr. Phil Snowdon, Superintendent, Cheney School District, Dr. Mark Mitrovich, Superintendent, Peninsula School District, and Dr. Ellen Wolf, Superintendent, Walla Walla School District, appearing by and through their attorney, Michael A. Patterson.

THIS MATTER having come before the Court for hearing on September 25, 1998, October 9, 1998, November 6, 1998, November 20, 1998, and December [(4) 3rd, /s/ CAP] 1998, and on defendants' and plaintiffs' motions for summary judgment and dismissal, and the Court having reviewed and considered the files and records herein, and the following documents:

DEFENDANTS BERGESON'S AND LEHMAN'S MOTIONS FOR SUMMARY JUDGMENT

- Defendants Bergeson's and Lehman's Motion for Summary Judgment; Memorandum of Authorities in Support of Summary Judgment and Dismissal; Declaration of Lisa L. Sutton in Support of Motion for Summary Judgment and Dismissal by Bergeson and Lehman dated September 8, 1998 with attached appendices 1-31 and stipulated facts 1-8.

- Appendices 1-31 to Defendants Bergeson's and Lehman's Motion for Summary Judgment:

Appendix #

1 Plaintiffs' Third Amended Complaint for Injunctive and Declaratory Relief and Compensatory Education (original complaint filed November 4, 1997, third amended complaint dated August 4, 1998)

2 Defendant Teresa Bergeson's Second Amended Answer and Defenses to Plaintiffs' Third Amended Complaint

3 Defendant Joseph Lehman's Second Amended Answer and Defenses to Plaintiffs' Third Amended Complaint; Defendant Shelton School District's Amended Answer; Defendant

School Districts' Amended Answer; Defendant School Districts' Amended Answer

4 Stipulated Facts

5 Stipulated Legal Issues

6 Washington State Const. art. II, § 29; art. III, § 22; art. IX, §§ 1 and 2; and art. XIII, § 1

7 *Seattle School Dist. 1 v. State*, 90 Wn.2d 476, 585 P.2d 71 (1978) (*School Funding I*)

8 Judge Robert Doran's Oral Opinion (April 29, 1983) and Declaratory Judgment (September 7, 1983) in *Seattle School Dist. No. 1 v. State*, (School Funding II); Thurston County Superior Court No. 81-2-1713-1.

9 Black's Law Dictionary (6th Ed. 1990), p. 33, 239, definition "adult" and "child"

10A RCW 13.04.020(14); RCW 13.04.030(2)(iv); RCW 13.40.110

10B *In Re Boot*, 130 Wn. 2d 553 (1996)

11 *Tommy P. v. Bd. Of Comm'rs*, 97 Wn.2d 385, 645 P.2d 697 (1982)

12 Washington State's Enabling Act §§ IV, X, XI, XIII, and XVII

13 RCW 28A.150.010, .020, and .200

14 *School Dist. No. 20 Spokane Co. v. Bryan*, 51 Wash. 498, 504, 99 P. 28 (1909)

15 RCW 28A.190.020

16 Laws of 1890, ch. 8, p. 271, §§ 1 and 4

17 Op. Att'y Gen. No. 6, (1998)

18 RCW 28A.155.090 (7)

19 Laws of 1998, ch. 244 (ESSB 6600)

20 *Aetna Life Insurance Co. v. Washington Life & Disability Insurance Guaranty Ass'n*, 83 Wn.2d 523, 528, 520 P.2d 162 (1974)

21 *McDonald v. Board of Election Commissioners of Chicago*, 394 U.S. 802, 809, 89 S. Ct. 1404, 22 L. Ed. 2d 739 (1969)

22 RCW 72.09.460; Laws of 1997, ch. 338 (E3SHB 3900)

23 *Board of Education of the Hendrick Hudson Central School Dist. v. Rowley*, 458 U.S. 176, 208, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982)

24 *Commonwealth of Virginia, Dept. of Educ. v. Riley*, 106 F.3d 559, 566 (4th Cir. 1997)

25 20 U.S.C. § 1400 *et seq.* Individuals With Disabilities Act (selected portions)

26 34 C.F.R. § 300.300(b)(5)

27 *Yankton School District v. Schramm*, 93 F.3d 1369, 1376-77 (8th Cir. 1996) *Timms v. Metro District of Wabash County*, 722 F.2d 1310, 1314 (7th Cir. 1983) *Merrifield v. Lake Centennial School Corp.*, 770 F. Supp. 468 (N.D. Ind. 1991)

28 *Sellers v. School Bd. of Manassas, Va.*, 141 F.3d 524, 528-29 (4th Cir. 1998)

29 *Monahan v. Nebraska*, 687 F.2d 1164, 1170 (8th Cir. 1982)

30 29 U.S.C. § 794(a); § 504 Rehabilitation Act of 1973

31 34 C.F.R. §§ 104.3(k), 104.31, 104.33

- Reply Memorandum in Support of Defendants Lehman's and Bergeson's Motion for Summary Judgment; Declaration of Lisa L. Sutton in Support of Reply Memorandum for Summary Judgment and Dismissal by Bergeson and Lehman dated September 15, 1998 with attached appendix 32.

Appendix #	
32	House Bill Report on ESSB 6600 and History of ESSB 6600

DEFENDANTS SCHOOL DISTRICTS' MOTION FOR SUMMARY JUDGMENT

- Defendants Cheney, Monroe, Walla Walla, Peninsula, Cape Flattery, Steilacoom Historical and Shelton School Districts' Motion for Summary Judgment (and Memorandum); Declaration of William A. Coats dated September 8, 1998 with attached Exhibits 1-5:

Exhibit #	
1	Laws of 1997, ch. 338 (ESHB 3900)
2	Laws of 1998, ch. 244 (ESSB 6600)
3	Stipulated Facts
4	Stipulation of Legal Issues to be Determined on Summary Judgment
5	Transcript of Hon. Robert Doran's Oral Opinion in *Seattle School District No. 1 v. Washington*, pages 11-16

- Defendants School Districts' Response to Summary Judgment Motion of Plaintiffs dated September 15, 1998;
- Reply of Defendants School Districts in Support of Motion for Summary Judgment dated September 21, 1998.

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

- Plaintiffs' Memorandum In Opposition To Defendants' Motions For Summary Judgment And To Dismiss; Supplemental Declaration of Patricia J. Arthur in Opposition to Defendants' Summary Judgment Motion dated September 15, 1998 with attached Exhibits 1-15:

Exhibit #	
1	Memorandum dated November 6, 1997 from Terry Bergeson to Rep. Huff and Sen. West (OSPI Document #07-00002500-07-00002502)
2	Letter dated September 22, 1997 from D. Savage, Deputy Secretary of DOC to J. Hansen, Supt. Shelton School District. (OSPI Document #19-00000372)
3	"Staffing Paper" prepared by W. Johnson, OSPI Supervisor of Institutional Education to Terry Bergeson, Superintendent of Public Instruction, dated October 2, 1997 (OSPI Document #07-00002529-07-00002532)
4	OSPI 1998 Supplemental Budget Request
5	Transcript of Senate Education Committee Meeting of the Washington Legislature held January 23, 1998
6	House Education Committee Meeting of the Washington Legislature held February 24, 1998 Document #07-00002413-07-00002420
7	List of all prisoners under DOC jurisdiction who have been transferred to prisons out-of-state (DOC document #34 Correspondence)
8	Declaration of Donald Lambert undated

9 Correspondence between Patricia J. Arthur and counsel for the Department of Corrections regarding communications with class members at Clallam Bay Corrections Center and out-of-state-prisoners under age 18 dated September 9, 1998

10 Memorandum dated October 28, 1994, to C. Yates, DOC Assistant Div. Dir. Of Management & Budget from A. Sweeney, DOC Education Services Admin, and J. Elliott, DOC Educational Services Manager (DOC document # LEG-00030610-LEG-00030617)

11 Letter dated November 4, 1997 from J. Hansen, Supt. Shelton School District to D. Savage, Deputy Secretary, DOC

12 United States Senate Report No. 94-168 (1975) regarding the Education For All Handicapped Children Act of 1975

13 Transcript of proceedings on August 7, 1998 in *Tunstall v. Bergeson*, Thurston County Superior Co. Superior Court No. 97-2-02754-1

14 Memorandum dated October 27, 1986 to K. Kautzky, Deputy Secretary, DOC, and R. Fanning, Dir. Div. of Management & Budget from D. Carnahan, Educational Administrator, DOC (DOC document # RPTS 00071792 – 00071797), including attachments: (a) New Request Level for Special Education Teachers by Institutions, (DOC Document # RPTS-00071794); (b) letter dated October 23, 1986, to J. Schrag, Asst. Supt. OSPI form D. Carnahan, Educational Admin., (DOC document # RPTS-00071795); (c) October

20, 1986 Memorandum to A. Lynch, OSPI Institutional Education Coordinator, from D. Carnahan (DOC document # RPTS 00071796 – 00071797)

15 Declaration of Minh Thach dated September 15, 1998

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

- Plaintiffs' Motion for Summary Judgment; Memorandum in Support of Plaintiffs' Motion for Summary Judgment; Declaration of Patricia J. Arthur in Support of Plaintiffs' Motion for Summary Judgment dated September 8, 1998 with attached Exhibits 1-11:

Exhibit #

1 Excerpts from the 1991 OSPI/DOC Task Force Report on Special Education in Adult Corrections. Document #03-00001278, produced during discovery by OSPI, is the distribution cover memo, and document # RPTS-00070249-00070253, produced by DOC, is the introductory section of the Task Force Report.

2 Letter dated September 15, 1997 from defendant Lehman to defendant Bergeson, produced by OSPI during discovery as document #19-00000370

3 Excerpts of the deposition of Teresa Bergeson, Superintendent of Public Instruction, that was taken in this case on May 18, 1998

4 OSPI/DOC Joint Report to the Legislature dated May 1998, produced by OSPI as document #03-00001454-03-00001462

5 A document entitled "Columbia Legal Services request to OSPI for disability assessments and special education services" that was produced by OSPI as document #19-00000380-19-00000381

6 Findings of Fact and Conclusions of Law in *Seattle School District v. State*, Thurston County Superior Court No. 81-2-1713-1, by Honorable Robert Doran, entered on September 7, 1983

7 Memo dated January 22, 1998 from Jean Stewart, DOC Educational Services Administrator, to Vicki Rummig, produced by DOC as document #LEG-00030742-00030744

8 Pages 14 and 15 from the transcript of the discovery hearing conducted in this case on July 21, 1998

9 Plaintiffs' Amended Responses to OSPI's Interrogatories Numbers 1-3 dated July 30, 1998

10 Excerpts of the deposition of Ann Fessler, a teacher at the WCCW, that was taken in this case on May 27, 1998

11 Two letters (received February 18, 1998 and July 20, 1998) from Donald Lambert, a member of the plaintiff class in this case who is incarcerated at Clallam Bay Corrections Center

- Plaintiffs' Short Answers to the Issues of Law for Determination of Summary Judgment dated September 8, 1998 with attachments:

(1) Stipulated Facts;

(2) Clallam Bay Corrections Center Education Program Agreement Between The Superintendent of Public Instruction and Cape Flattery School District No. 401 (Exhibit 1);

(3) Interagency Cooperation Agreement Between The State of Washington's Department of Corrections and Cape Flattery School District (Exhibit 2);

(4) Washington Corrections Center for Women Education Program Agreement Between The Superintendent of Public Instruction and Peninsula School District No. 401 (Exhibit 3);

(5) Interagency Cooperation Agreement Between The State of Washington's Department of Corrections and Peninsula School District (Exhibit 4);

(6) Letter from Dr. Terry Bergeson to Representative Tom Huff, Senator Jim West, and Richard Thompson, Director, OFM dated November 6, 1997 (Exhibit 5);

(7) Letter from Dick Thompson, Director OFM to Dr. Terry Bergeson dated December 4, 1997-07-00002479-07-00002480 (Exhibit 6);

(8) Interagency Cooperation Agreement Between The State of Washington's Department of Corrections and The Office of The Superintendent of Public Instruction and Peninsula School District – 01-00000002-01-00000020 (Exhibit 7);

(9) Letter from Dr. Terry Bergeson to ESD Superintendents, Chief School District Administrators, School District Special Education Directors, ESD Special Education Directors, Universities and Colleges, and Private Education Contractors dated May 29, 1998 03-00001779-03-00001788 (Exhibit 8).

- Reply Memorandum in Support of Plaintiffs' Motion for Summary Judgment; Second Supplemental Declaration of Patricia J. Arthur in Support of Plaintiffs' Motion for Summary Judgment; Declaration of Maureen Janega dated September 21, 1998 with attached Exhibits 1-15:

Exhibit#

1 Declaration of Donald Lambert dated September 17, 1998.

2 Declaration of Willard Jimerson dated September 17, 1998*

3 Declaration of Phillip Krist dated September 17, 1998

4 Declaration of Vernell Marshall dated September 17, 1998*

5 An article published on August 27, 1998, in the *Seattle Weekly* titled "Little Fish In The Big House"

6 Declaration of Terry Burkett dated September 17, 1998*

7 Signed version of the Declaration of Minh Thach dated September 17, 1998

8 Testimony of Terry Werner, Asst. Superintendent for the Peninsula School District, before the Washington State Legislature, House Education Committee, September 17, 1998

(*The Court excluded from consideration hearsay statements by the school personnel contained in Plaintiffs' exhibits 2, 4, and 6 attached to the Second Supplemental Declaration of Patricia J. Arthur; *see* Court's Order dated October 9, 1998.)

PLAINTIFFS' MOTION TO CLARIFY
COURT'S ORAL RULING
OF OCTOBER 9, 1998

1 Plaintiffs' Motion for Clarification of Court's Oral Ruling of October 9, 1998; Memorandum in Support of Plaintiffs' Motion; Declaration of David Fathi (with attached Verbatim Transcript of Ruling October 9, 1998) dated October 27, 1998

2 Defendants Lehman's and Bergeson's Response to Plaintiffs' Motion for Clarification (with attachments) dated November 3, 1998

3 Defendants School Districts' Response to Plaintiffs' Motion for Clarification dated November 3, 1998

4 Plaintiffs' Reply Memorandum in Support of Plaintiffs' Motion for Clarification; Supplemental Declaration of David Fathi (with Exhibit A) dated November 5, 1998.

PLAINTIFFS' MOTION FOR RECONSIDERATION OF THE COURT'S ORDER OF NOVEMBER 6, 1998

1 Plaintiffs' Motion to Shorten Time; Declaration In Support of Plaintiffs' Motion to Shorten Time; Motion for Reconsideration of the Court's Order of November 6, 1998; Memorandum in Support of Plaintiffs' Motion for Reconsideration of the Court's Order dated November 13, 1998

2 Plaintiffs' Reply to Defendants' Opposition to Plaintiffs' Motion for Reconsideration dated November 19, 1998

DEFENDANTS BERGESON'S AND LEHMAN'S MOTION FOR STAY AND MOTION TO REVISE/AMEND JUDGMENT

1 Motion for Stay, and Motion to Amend/Revise Judgment, Memorandum in Support, Affidavit of Jean Stewart and Jennifer Priddy (with attached RFP) dated November 12, 1998

2 Reply of Bergeson and Lehman in Support of Motion for Stay dated November 19, 1998

3 Declaration of David C. Fathi in Opposition to Defendants' Motion for Stay (with Exhibit 1 dated November 30, 1998

DEFENDANTS BERGESON'S AND LEHMAN'S MOTION FOR ENTRY OF A FINAL JUDGMENT/MOTION FOR AN ORDER SHORTENING TIME

1 Motion for An Order Shortening Time on Motion for Entry of a Final Judgment; Order Shortening Time; Order Granting Motion to Stay and Motion to Amend/Revise Judgment; Motion for Entry of Final Judgment Under CR 54(b) (with attached October, 9th and November 6th Orders); Memorandum of Authorities in Support of Motions; Declaration of Lisa Sutton in Support of Motions; Amended Order for Summary Judgment dated November 16, 1998

2 Plaintiffs' Memorandum in Opposition to Defendants Bergeson's and Lehman's Motion for Stay Pending Appeal

FINDING OF UNDISPUTED FACTS

The Court finds that the parties have agreed that certain facts are undisputed. With the exception of Stipulated Fact No. 14, the facts contained in the Stipulated Facts (document incorporated herein by reference) are not in dispute.

CONCLUSIONS OF LAW

1. The Washington State Constitution, Article IX, requires the State to make ample provision for the education of all children residing within its borders, without distinction.

2. The Basic Education Act, RCW 28A, requires that basic education services be provided to children between the ages of 5 and 21 and special education to children with disabilities between the ages of 3 and 22. This age range applies to all constitutional provisions and statutes dealing with education, and the State may not discriminate based on caste or class.

3. The Court further finds that Article IX of the Washington Constitution imposes a paramount duty on the State to provide basic and special education to prisoners of the Department of Corrections in the age range specified in the Basic Education Act.

4. Any change in the age definition of "children" for educational purposes must be uniform and must apply to all children who fit into any redefined age group.

5. The Court finds that the paramount duty under the Washington Constitution to provide for basic and special education in prison creates an absolute right.

6. The Court finds that Engrossed Substitute Senate Bill 6600 (Chapter 244, Laws of 1998) impinges on the absolute right to basic and special education in that: 1) it does not provide for special educational opportunities, and 2) it limits the availability of basic education to children under the age of 18. Therefore, the Court presumes it to be unconstitutional. The State has not carried its burden of showing that the infringement of this absolute right is necessary to serve a compelling state interest.

7. The Court therefore finds that Chapter 244 of the Laws of 1998 is unconstitutional.

8. The Court finds that the school districts have no obligation under the federal or state constitutions or federal laws or Washington State laws to provide educational programs to persons in the prisons of the State of Washington, and holds that the school districts are not obligated under the state or federal constitutions or state of federal law to provide education in prisons in Washington State.

9. The Court finds that defendants Bergeson and Lehman have no obligation under either federal statutes or the federal constitution to provide special education in prisons in Washington.

The Court having considered the records and files herein, having heard oral argument on these motions, and being fully informed, it is now, therefore, ORDERED, ADJUDGED AND DECREED as follows:

ORDER

Having reviewed the above matter, the Court orders the following:

IT IS HEREBY FURTHER ORDERED that summary judgment is GRANTED in favor of plaintiffs.

IT IS HEREBY FURTHER ORDERED that defendants school districts' motion for summary judgment is GRANTED.

IT IS HEREBY FURTHER ORDERED that defendants Bergeson's and Lehman's motion for summary judgment is DENIED.

IT IS HEREBY FURTHER ORDERED that plaintiffs' motion to clarify is hereby GRANTED IN PART and DENIED IN PART.

IT IS HEREBY FURTHER ORDERED that plaintiffs' motion to reconsider the federal claims (the order dated November 6, 1998), is hereby GRANTED.

IT IS HEREBY FURTHER ORDERED that plaintiffs' federal claims are DENIED and DISMISSED with prejudice.

IT IS HEREBY FURTHER ORDERED that defendants Bergeson's and Lehman's Motion for Order shortening time is GRANTED.

IT IS HEREBY FURTHER ORDERED that defendants Bergeson's and Lehman's motion for stay is hereby DENIED. Defendants Bergeson and Lehman are GRANTED a continuance until December 18, 1998, to file a corrective action plan.

IT IS HEREBY FURTHER ORDERED that defendants Bergeson's and Lehman's motion for entry of final judgment is hereby GRANTED.

DATED this 3 day of December, 1998.

/s/ Christine A. Pomeroy
JUDGE CHRISTINE A. POMEROY
Thurston County Superior Court

Presented by: CHRISTINE O. GREGOIRE
Attorney General

/s/ Lisa L. Sutton
LISA L. SUTTON,
WSBA #16005
Assistant Attorney General
W. HOWARD FISCHER,
WSBA #6142
Senior Assistant Attorney General
ROBERT E. PATTERSON,
WSBA #644
Senior Counsel, Assistant Attorney General
Attorneys for Defendant Teresa Bergeson
Superintendent of Public Instruction

/s/ Thomas J. Young
THOMAS J. YOUNG,
WSBA #17366
Assistant Attorney General
Attorneys for Defendant, Secretary
Department of Corrections

/s/ Michael A. Patterson
MICHAEL A. PATTERSON,
WSBA #7976
Attorney for Defendants Superintendents of Steilacoom; Cape Flattery; Monroe; Cheney; Peninsula; and Walla Walla School Districts

WILLIAM A. COATS,
WSBA #4608
Attorney for Defendant, Superintendent, Shelton School Dist.

Approved as to form;
notice of presentation waived:

/s/ Patricia J. Arthur
PATRICIA J. ARTHUR,
WSBA #13769
DAVID C. FATHI,
WSBA #24893
Attorneys for Plaintiffs

/s/ Patricia H. Wagner
PATRICIA H. WAGNER,
WSBA #14126
ANGELA LUERA,
WSBA #22129
Attorneys for Plaintiffs

APPENDIX D

THE SUPREME COURT OF WASHINGTON

SUNSIRAE TUNSTALL, a minor, by and through her mother, TANYA TUNSTALL; PHILLIP KRIST, a minor, by and through his grandmother and legal guardian, FRANCES KRIST, et al.,

Respondents/Cross-Appellants,

v.

TERESA BERGESON, Superintendent of Public Instruction; and JOSEPH LEHMAN, Secretary, Department of Corrections,

Appellants/Cross-Respondents.

NO. 67448-5

ORDER DENYING MOTION FOR RECONSIDERATION

(Filed Oct. 6, 2000)

The Court having considered the Respondents/Cross-Appellants' Motion for Reconsideration and/or Clarification;

Now, therefore, it is hereby

ORDERED:

That the Respondents/Cross-Appellants' Motion for Reconsideration and/or Clarification is denied.

DATED at Olympia, Washington this 6th day of October 2000.

/s/ Richard G. Guy
CHIEF JUSTICE

APPENDIX E

20 U.S.C. §§ 1412(1) and (2)(B) (Supp. 1996)

(1) The State has in effect a policy that assures all children with disabilities the right to a free appropriate public education.

(2) The State has developed a plan pursuant to section 1413(b) of this title in effect prior to November 29, 1975, and submitted not later than August 21, 1975, which will be amended so as to comply with the provisions of this paragraph. Each such amended plan shall set forth in detail the policies and procedures which the State will undertake or has undertaken in order to assure that –

* * *

(B) a free appropriate public education will be available for all children with disabilities between the ages of three and eighteen within the State not later than September 1, 1978, and for all children with disabilities between the ages of three and twenty-one within the State not later than September 1, 1980, except that, with respect to children with disabilities aged three to five and aged eighteen to twenty-one, inclusive, the requirements of this clause shall not be applied in any State if the application of such requirements would be inconsistent with State law or practice, or the order of any court, respecting public education within such age groups in the State;

* * *

APPENDIX F

20 U.S.C. § 1412. State eligibility

(a) In general

A State is eligible for assistance under this subchapter for a fiscal year if the State demonstrates to the satisfaction of the Secretary that the State has in effect policies and procedures to ensure that it meets each of the following conditions:

(1) Free appropriate public education

(A) In general

A free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school.

(B) Limitation

The obligation to make a free appropriate public education available to all children with disabilities does not apply with respect to children:

(i) aged 3 through 5 and 18 through 21 in a State to the extent that its application to those children would be inconsistent with State law or practice, or the order of any court, respecting the provision of public education to children in those age ranges; and

(ii) aged 18 through 21 to the extent that State law does not require that special education and related services under this subchapter be provided to children with

disabilities who, in the educational placement prior to their incarceration in an adult correctional facility:

(I) were not actually identified as being a child with a disability under section 1401(3) of this title; or

(II) did not have an individualized education program under this subchapter.

* * *

APPENDIX G

34 C.F.R. § 300.2 Applicability to State, local, and private agencies.

(a) *States.* This part applies to each State that receives payments under Part B of the Act.

(b) *Public agencies within the State.* The State plan is submitted by the State educational agency on behalf of the State as a whole. Therefore, the provisions of this part apply to all political subdivisions of the State that are involved in the education of children with disabilities. These would include:

(1) The State educational agency;

(2) Local educational agencies and intermediate educational units;

(3) Other State agencies and schools (such as Departments of Mental Health and Welfare and State schools for students with deafness or students with blindness); and

(4) State correctional facilities.

(c) *Private schools and facilities.* Each public agency in the State is responsible for ensuring that the rights and protections under this part are given to children referred to or placed in private schools and facilities by that public agency.

APPENDIX H

16 EHLR 1401
16 Educ. for the Handicapped Law Rep. 1401

LETTER TO BREECHER

Coordinator, Policy and Legal Assistance
Special Education Section
Arizona Department of Education
1535 West Jefferson
Phoenix, AZ 85007

Digest of Inquiry
(July 25, 1990)

• Does res judicata apply to final administrative decisions?

Is a tribal government eligible for EHA-B funds?

Are public agencies obligated to provide special education and related services to persons under the age of 22 years who are incarcerated in adult correctional facilities?

Digest of Response
(August 30, 1990)

Final Administrative Decision Generally Binds Parties

A final administrative decision, generally, is binding upon the parties involved in the hearing. Parents may be entitled to a new due process hearing, however, if the parties or circumstances have changed since the original complaint.

Tribal Governments Are Not Entitled to EHA-B Funds

Unless a tribal government has the status of a local educational agency (LEA) or an intermediate educational unit (IEU), it may not receive funds from the 75-percent of the EHA-B state grant which is allocated for LEAs and IEUs. Moreover, a tribal government is not entitled to funds from the 25-percent of the EHA-B grant available to the state educational agency (SEA) for discretionary purposes. The SEA may chose, however, to use a portion of its discretionary funds to contract with a tribal government to provide services to children with disabilities.

Eligible Inmates Must Receive FAPE

The state educational agency (SEA) must ensure that all persons with disabilities, within the state-mandated age-range, are provided FAPE, including persons incarcerated in adult correctional facilities. EHA-B services for eligible inmates may be provided directly by the SEA or by local educational agencies (LEAs) or intermediate educational units (IEUs).

Text of Inquiry

I am writing to request a formal written opinion on three separate issues:

1) First, what is the res judicata effect of a final hearing officer decision? Specifically, if a parent takes a district to due process and the district prevails, the appellate hearing review officer affirms the first decision, and

the parent chooses not to appeal into court, is the decision on that matter binding as to all districts in the jurisdiction? For example, if the parent intentionally moves to another school district to avoid implementation of the hearing officer decision, must the second school district take the parent to hearing on the same issue?

2) The second series of questions relate to tribal governments. First, is a tribal government eligible to receive 6B dollars? Second, is a tribal government that runs its own Head Start program able to serve as its own fiscal agent to receive 6B dollars, if they are eligible for those funds? Finally, if the tribal government is not eligible to receive 6B dollars, how can the money be provided to ensure that eligible children are properly served?

3) The third, and most pressing, issue is whether public schools are required to provide special education to persons under age 22 who have been sentenced to adult correctional institutions?

I would like to request an expedited response to the third question. We are currently attempting to address this issue through a restructuring of identification, evaluation and placement procedures for handicapped children. We have developed a method for ensuring that the rights of handicapped students in the Department of Juvenile Corrections are addressed, but are not sure the EHA requires us to provide a free appropriate public education to persons committed to adult correctional facilities.

As always, thank you, in advance, for your response on these issues. Please feel free to contact me directly

should you need further clarification on any of the issues presented.

Text of Response

In response to your letter dated July 25, 1990 requesting our opinion on the three issues described in your inquiry, the following information is submitted for your review and consideration.

Issue 1

Question – What is the res judicata effect of a final hearing officer decision?

Response – The hearing officer's decision is final and binding upon the parties involved in the hearing. Any determination as to whether there is a res judicata effect will depend on whether the parents are entitled to a new due process hearing, which may depend on a number of other factors, e.g., the parties may be different and/or the circumstances may have changed from the original complaint.

Issue 2

Question – Is a tribal government eligible for 6B dollars?

Response – The Office of Special Education Programs gives a grant to the Bureau of Indian Affairs through the Department of the Interior, to provide support for special education services for tribal special education students. We assume your inquiry concerns the question as to

whether tribal governments are entitled to receive part of a State's (Arizona) Part B of the Education of the Handicapped Act (EHA-B) grant, and if not, whether a State can elect to provide the tribal government with funds to serve tribal children with special education services.

Under EHA-B, only local educational agencies (LEAs) or independent educational units (IEUs) have an entitlement to receive EHA-B funds. Unless the tribal government has the status of an LEA or an IEU, it would not be entitled to receive funds from the 75 percent set-aside pool of EHA-B monies that flow through to LEAs or IEUs, nor do they have an entitlement to receive funds from the 25 percent portion of the EHA grant, which is available to States for discretionary purposes in serving the needs of children with handicaps. However, a State may elect to use a portion of its 25 percent set-aside funds to contract with tribes for services for children with disabilities.

Issue 3

Question – Whether public schools are required to provide special education to persons under age 22 who have been sentenced to adult correctional institutions?

Response – The requirement to provide a free appropriate public education (FAPE) to all children with disabilities within the State-mandated age range applies to individuals with disabilities in those age ranges who have been placed in adult correctional institutions.

The State must ensure that FAPE is being provided to all individuals in adult correctional institutions who are

eligible for those services under EHA-B. Programs to provide these services can be State-operated or provided by LEAs or IEUs.

I hope that the above information is helpful. If this Office can be of additional assistance, please let me know.

Judy A. Schrag, Ed.D.
Director
Office of Special Education Programs

APPENDIX I

INDIVIDUALS with DISABILITIES EDUCATION LAW REPORT **Cite as 28 IDELER 307**

Thomas M. Maddock
Interim Director
California Department of Corrections
P.O. Box 942883
Sacramento, CA 90283-0001

Digest of Inquiry
(June 5, 1997)

- Does the IDEA allow a state to choose not to provide incarcerated students with disabilities with special education services?

Digest of Response
(June 30, 1997)

States Must Provide FAPE To Eligible Students Incarcerated In Adult Correctional Facilities

OSEP stated that Part B requires states to provide a FAPE to all students with disabilities, which includes those who are incarcerated in adult correctional facilities. IDEA 1997 does not change this requirement, although it allows states to designate a state agency other than the state department of education as the state agency responsible for providing services to students who are incarcerated in adult facilities. Under IDEA 1997, states can also restrict eligibility for services to students incarcerated in adult facilities who, prior to their incarceration, were designated as a student with a disability or had an IEP. OSEP reminded the state that it was required to implement the corrective actions

called for in a previous monitoring report, which found the state was not complying with its obligation to provide students with disabilities incarcerated in adult prisons with special education and stated the available enforcement actions if the state continued to refuse to comply.

Text of Response

This letter responds to your June 5, 1997 letter to Secretary Riley in which you informed the Secretary of the California Department of Corrections' (CDC) "election of its right under the IDEA to not provide special education services to convicted felons." I am writing to inform you that the Department of Education does not interpret the Individuals with Disabilities Education Act (IDEA) to provide States with the option to refuse to provide these services.

Part B of the IDEA and its implementing regulations have consistently required that a free appropriate public education be available to all eligible children with disabilities, including eligible youth with disabilities in State adult correctional facilities. See, 34 CFR § 300.2(b)(4); *Alexander S. v. Boyd*, 876 F.Supp. 773, 800-801 (D.S.C. 1995); *Donnell C. v. Ill. State Bd. of Educ.*, 829 F.Supp. 1016, 1020 (N.D.Ill. 1993); and *Green v. Johnson*, 513 F.Supp. 965, 976 (D.Mass. 1981). The IDEA Amendments of 1997 affirm this obligation, while specifically allowing for transfer, by the Governor, of the general supervisory authority for serving youth with disabilities who are convicted as adults under State law and incarcerated in

adult prisons, to a State agency other than the State educational agency. Section 612(a)(11)(C). The State education agency remains responsible for making a free appropriate public education available to any youth with disabilities in adult prisons who were not convicted as adults under State law. The 1997 amendments also allow States to limit eligibility for a free appropriate public education to youth with disabilities convicted as adults under State law and incarcerated in adult prisons who, in the educational placement prior to their incarceration in an adult correctional facility, were identified as being a child with a disability or who had an individual education program. Section 612(a)(1)(B).

On June 5, 1997, in his Executive Order W-155-97, Governor Wilson transferred from the California Department of Education (CDE) to CDC the responsibility of ensuring that the requirements of the IDEA are met with respect to eligible youth who are convicted as adults under State law and are incarcerated in adult prisons. The Executive Order also directs CDC to seek from the Congress full exemption from the requirements of the IDEA, and to request that the Department delay any federal compliance hearings or actions pending a final resolution of these additional efforts.

Your June 5 letter states that CDC is electing not to provide special education services to eligible inmates with disabilities in State prisons. There is no reference in the letter to a specific IDEA provision which would allow such an election, and, as noted above, the Department does not interpret the IDEA Amendments of 1997 to allow States to exclude this population from the protections of the Act.

The Department of Education's Office of Special Education Programs, during a January 1995 monitoring visit to California, found that special education services were not available to eligible youth with disabilities in any of California's adult correctional facilities. These findings are set out in a February 5, 1996 monitoring report (copy enclosed) which required that corrective action be taken to provide special education and related services to these individuals. To date, corrective action has not been taken, and your June 5 letter requested cancellation of a hearing that had been scheduled to develop a compliance agreement.

Section 616(a) of the IDEA provides that when the Secretary finds that a State has failed to comply substantially with the Act, he may withhold, in whole or in part, further payments to that State or may refer the matter for appropriate enforcement action, including referral to the Department of Justice. Section 616(c) provides that any withholding of funds to an agency, other than the State education agency, that is responsible for youth with disabilities convicted as adults and incarcerated in adult prisons and that has not complied with the IDEA, is limited to funds provided to that agency and to an amount that is proportionate to the percentage of eligible children and youth with disabilities in the State who are in adult prisons under the supervision of that agency. In addition, section 454 of the General Education Provisions Act provides that, when a recipient of funds under one of the Department's programs is failing to comply substantially with any requirement of that program, the Secretary may enter into a compliance agreement with the recipient or may issue a complaint to compel compliance through a

cease and desist order of the Office of Administrative Law Judges.

Thus, the Department has a number of enforcement options to address a substantial failure to comply with the requirements of the IDEA related to eligible youth with disabilities who are convicted as adults and incarcerated in adult prisons. We would prefer to work cooperatively with your agency and to enter into a compliance agreement to bring CDC into compliance with the Act, but we are obligated to move expeditiously to ensure that all eligible children and youth in the State of California have available to them the free appropriate public education to which they are entitled under the IDEA.

APPENDIX J

INDIVIDUALS with DISABILITIES EDUCATION LAW REPORT

Cite as 28 IDELR 308

Honorable Pete Wilson
Governor of California
State Capitol
Sacramento, CA 95814

Digest of Inquiry
(July 24, 1997)

- Can the U.S. Department of Education condition a state's entire IDEA federal grant on the state's agreement to provide a FAPE to students with disabilities incarcerated in adult prisons?

Digest of Response
(September 4, 1997)

Conditions Can Be Placed On State's IDEA Federal Grant Due To Failure To Serve Incarcerated Students

The Secretary of Education personally responded to the inquiry and stated that the condition imposed on California's federal IDEA grant was allowed under the law. IDEA 1997 requires states to provide a FAPE to students incarcerated in adult prisons, and no section of the statute gives states the option to refuse to serve this class of students. The Secretary further clarified the possible enforcement actions available, which include: withholding of funds; injunctive relief; a cease and desist order; and a compliance agreement.

Text of Inquiry

California hereby rejects the condition which one of your Department subordinates has improperly sought to impose upon California's acceptance of the full $306 million federal grant award provided for the Federal Fiscal Year 1997 pursuant to the Individuals with Disabilities Education Act (IDEA) Amendments of 1997. That condition, placed in a cover letter but not in the grant award notification, provided that "[a]cceptance by California of this grant award constitutes an agreement by the State" to make a free public education available to disabled felons over the age of 18 incarcerated in adult correctional facilities, which would divert precious funds from law-abiding children to adult convicts.

Because that condition reflects a dramatic misinterpretation of the new IDEA law, California rejects the condition and accepts the full grant in accordance with the terms of the grant award notification, minus the amount permitted under IDEA to be deducted when a state chooses not to divert special education services to convicted felons in state prison.

Specifically, the new IDEA law gives states the right under IDEA not to divert special education services to individuals "convicted as adults under State law and incarcerated in adult prisons," by limiting "any reduction or withholding of payments to the State" to the proportion of the grant equal to the percentage of the number of eligible individuals in adult prisons divided by the entire IDEA-eligible population. *See* §§ 612(a)(11)(C); 616(c). Indeed, the Act stresses in a separate section that "any

withholding of funds . . . shall be limited to the specific agency responsible" for the decision not to provide such services to felons in adult correctional facilities.

Notwithstanding the plain wording and legislative intent of the IDEA law, Assistant Secretary Judith Heumann in a July 16, 1997, letter threatened California with the loss of its entire federal grant unless California agreed to divert special education services to convicted felons incarcerated in state prisons. That letter followed a June 30, 1997, letter from Ms. Heumann to California's Department of Corrections (CDC) asserting that, far from the exclusive remedy Congress specified for states electing to not provide such services, the Department "has a number of enforcement options to address a substantial failure to comply with the requirements of the IDEA related to eligible youths with disabilities who are convicted as adults and incarcerated in adult prisons. . . . "

Ms. Heumann's demand subverts the plain meaning of the new IDEA law and is contrary to the legislative history surrounding the Act's enactment. Representative Bill Goodling, Chairman of the Committee on Education and the Workforce, which reported the IDEA reauthorization bill, wrote that the statute "ensures that California would lose only a small share of its entire $300 million Federal allotment for special education if it decides not to provide services for adult prison inmates." Speaker Gingrich similarly recognized California's ability under the Amendments "to deny services for adult prisoners while forfeiting only the pro-rata share of federal funding for that small segment of the total IDEA-eligible population."

The sentiment expressed in the Senate was to the same tune. In a colloquy with Senators Harkin and Jeffords, Senator Boxer expressed the view that "if California does not provide special education services in prisons it stands to lose only one-fourth of 1 percent of its allotted share [and] would not longer face the possible loss of its allotted special education funds." Senators Harkin and Jeffords expressed their unqualified agreement with that interpretation of the Amendments. Cong. Rec. S4375-76 (May 13, 1997).

This legislative intent will be determined in interpreting the legislation, as it will dispositively outweigh any competing interpretation subsequently given by your Department. *See Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 843 n.9 (1984) (the judiciary "must reject administrative constructions which are contrary to clear congressional intent.")

Ms. Heumann attempts to buttress her threat of a total loss of California's federal grant on a second, equally spurious theory: that proportionate withholding is unavailable since the California Department of Education is also responsible for this decision as it "retains responsibility under that section for any eligible youth with disabilities in such facilities who were not convicted as adults." Ms. Heumann is misinformed. There are no youths incarcerated under the jurisdiction of CDC who have not been convicted as adults.

Because Congress's recent IDEA legislation made crystal clear that the decision not to divert precious special education funds to convicted felons does not jeopardize the entire grant, I regard Ms. Heumann's attempt to

condition federal funding to California on this unlawful basis as out-and-out extortion.

Before concluding, allow me to offer the observation that there may be certain individuals within your agency zealous to impose their extralegal agenda upon the country. Congress's recent passage of the IDEA reauthorization bill responded to efforts by the Department to require that special education funds be diverted from law-abiding children to incarcerated felons in states' prisons. The new law must be respected by the Department. This present episode closely follows an aborted effort, now reversed, by the Department to coerce schools in Texas not to comply with the Fifth Circuit Court of Appeals' decision in *Hopwood v. Texas*, 78 F.3d 932 (5th Cir.), *cert. denied*, 116 S.Ct. 2580 (1996). It is not within the powers of any agency official to subvert the will of Congress or the Courts. Actions like those taken by Ms. Heumann show a deep disrespect for the rule of law.

Should the Department attempt to recoup the entirety of the $306 million federal funding grant to California which supports more than 48,000 disabled children, the Department will force California to divert limited public resources from existing education reforms, such as class size reduction and pupil testing, in order to backfill the loss of federal special education funds. I, therefore, hope you will respect CDC's decision under the IDEA law to return unspent exactly that portion of the 1997 grant that Congress has specified as the remedy for states opting not to spend scarce resources to provide special education services to convicted felons in state prisons.

Californians will perform an accounting to determine the precise figure and remit this amount to the federal government – a reasonable decision in light of the fact that the actual cost of diverting services to convicted felons overwhelmingly exceeds the proportionate reduction.

Text of Response

This is in response to your letter of July 24, 1997, expressing concern about the condition placed on California's federal grant under Part B of the Individuals with Disabilities Education Act (IDEA). I hope this also addresses the issues raised in your April 18, 1997, letter regarding promulgation of new IDEA regulations on special education services for youth with disabilities in adult correctional facilities.

Regarding the grant award condition, Assistant Secretary Judith E. Haumann's letter of July 16, 1997, was entirely appropriate. This Department's responsibility is to enforce the requirements of the IDEA, while ensuring continued funding for special education services for all eligible children and youth with disabilities in California. The IDEA Amendments of 1997, which passed Congress by large majorities of Republicans and Democrats, made it clear that all States must serve eligible youth with disabilities in adult correctional facilities. There are no provisions in the law that allow a State to elect to exclude all youth in adult facilities. As a result, as a condition of your IDEA grant, you do not have the option of rejecting the provision of these services. This requirement is

imposed by the statute, not by the Department of Education. The specific condition that the Department imposed upon California's grant was a reporting requirement regarding efforts made to save this population. This condition was imposed based upon California's history of noncompliance on this issue.

I would also like to correct what appears to be a serious misunderstanding of the enforcement provisions of the IDEA. The new law directs me to take "appropriate corrective action to ensure compliance" when there is a failure to provide required services to eligible youth with disabilities in adult correctional facilities. It also provides that if I choose to withhold funds from a State in these circumstances, the amount of that withholding is limited to the portion of the IDEA funds that represents the percentage of eligible children and youth with disabilities in the State who are convicted as adults and are in adult correctional facilities. Nothing in the IDEA requires that I use withholding as a means of enforcement if I believe that it is not the appropriate action to obtain compliance. Both the IDEA and the General Education Provisions Act set out a number of options for obtaining corrective action under Department programs. These options include, in addition to withholding funds, referring the matter to the Department of Justice for injunctive relief, obtaining a cease and desist order, and entering into a compliance agreement. I have not yet made a decision as to the corrective action that is most appropriate in this case.

Since February 1996, when we issued a monitoring report to the State citing its failure to make any special education services available in any of the State's adult

prisons, we have attempted to work with the State to ensure compliance with the requirements of federal law. Our efforts to resolve this issue cooperatively included offering the State a compliance agreement, under which it would have up to three years to come into compliance. It is still my strong preference to work with the State to enter into a compliance agreement. I am asking Assistant Secretary Heumann to provide you information on the assistance that would be available from the Department in working toward the development of a compliance agreement.

It is my sincere belief that the numerous changes to IDEA that allow States more flexibility in serving incarcerated youth, which the Department supported, should make possible the development of such an agreement. For example, States need only make available special education services to youth with disabilities, aged 18 through 21, who, in the educational placement prior to their incarceration in an adult correctional facility: (a) were actually identified as being a child with a disability under the IDEA; or (b) had an individualized education program under the IDEA. The new law also provides that youth with disabilities who are convicted as adults and in adult prisons need not participate in general testing programs conducted by the State, and that transition services to promote movement from school to employment and other post-school activities need not be provided to individuals in adult prisons whose eligibility under the IDEA will have ended because of their age before they are released from prison.

Most importantly, the education program and placement of eligible youth with disabilities who are convicted

as adults and in adult prisons can be modified if the State shows bona fide security interests. This provision allows these interests to be addressed on a case-by-case basis and in extreme circumstances, such as when a youth with disabilities poses an immediate threat to self or others, permits appropriate modifications or limitations to the educational program or placement, including suspension of services, in an appropriate period of time.

In California, a majority of incarcerated youth ages 21 or younger are serving sentences of 4 years of less. Then young people will be released back into society within a relatively short period of time. The majority of the studies that have looked at the benefits of prison education programs have shown that education has a positive effect on reduction recidivism and a positive effect on post-release employment success. Young prisoners with disabilities are among the least likely to have the skills they need to be able to hold a job. For them, education is probably the only opportunity they have to become productive, independent members of society.

I continue to hope that it will be possible for us to resolve this matter in a manner that serves the educational interests of all children consistent with the requirements of the IDEA.

APPENDIX K

INDIVIDUALS with DISABILITIES
EDUCATION LAW REPORT

Cite as 30 IDELR 50

Mr. George M. Galaza
Warden
California State Prison-Corcoran
4001 King Avenue
Corcoran, CA 93212-8309

Digest of Inquiry
(May 13, 1997)

• The warden of a California prison objected to IDEA 1997's requirements with respect to incarcerated students with disabilities.

Digest of Response
(November 6, 1997)

Special Education Must Be Provided To Some Incarcerated Students

OSEP stated that although IDEA 1997 requires the provision of special education to students with disabilities who are incarcerated in adult prisons, the provisions of the law provide some "flexibility" to states. Services are only necessary for incarcerated students with disabilities who are between 18-21 and had either an IEP or were identified as having a disability before being incarcerated. The placement of an incarcerated student can be modified for either bona fide security reasons or "compelling" penological interests. Further, students

with disabilities who are incarcerated in adult prisons due to a conviction as an adult do not have to participate in state-wide assessment programs, and transition services do not have to be provided to students whose IDEA eligibility expires before their release.

Text of Response

Secretary Richard W. Riley has asked me to respond to your letter to him of May 13, 1997. In your letter, you expressed your opposition to requiring special education services in adult prisons.

On June 4, 1997, the President signed the Individuals with Disabilities Education Act [(IDEA)] Amendments of 1997. That legislation includes a number of provisions regarding special education services for youth with disabilities in adult prisons, which reflect careful and extensive consideration of the issue by the Congress. These changes to IDEA make it clear that all States must serve eligible youth with disabilities in adult correctional facilities, but provide States with significant flexibility in serving incarcerated youth.

For example, States need only make available special education services to youth with disabilities, aged 18 through 21, who, in the educational placement prior to their incarceration in an adult correctional facility: (a) were actually identified as being a child with a disability under the IDEA; or (b) had an individualized education program under the IDEA. The new law also provides that youth with disabilities who are convicted as adults and in

adult prisons need not participate in general testing programs conducted by the State, and that the provisions requiring transition services to promote movement from school to employment and other post-school activities do not apply to individuals in adult prisons whose eligibility under the IDEA will end because of their age, before they will be released from prison.

Most importantly, the education program and placement of eligible youth with disabilities who are convicted as adults and in adult prisons can be modified if the State shows bona fide security or compelling penological interests that cannot otherwise be accommodated. This provision allows a team of professionals to address these issues on a case-by-case basis, and to respond to extreme circumstances, such as where a youth with disabilities poses an immediate threat to self or others, by making appropriate modifications or limitations to the educational program or placement, including suspension of services for an appropriate period of time. The Department has recently published proposed regulations under the IDEA, which are consistent with the requirements of the statute, as outlined above. A copy of the proposed regulations is enclosed.

The Department believes that providing special education to incarcerated youth with disabilities is good public policy. In California, a majority of incarcerated youth ages 21 or younger are serving sentences of 4 years or less. These young people will be released back into society within a relatively short period of time. The majority of the studies that have looked at the benefits of prison education programs have shown that education has a

positive effect on reducing recidivism and a positive effect on post-release employment success.

This is hardly surprising in light of the fact that nationwide, the literacy of prisoners is very, very low. About one-third of prisoners are unable to perform such simple job-related tasks as locating an intersection on a street map, or identifying and entering basic background information on an application. Another one-third are unable to perform slightly more difficult tasks such as writing an explanation of a billing error or entering information into an automobile maintenance form. Only about one in twenty can do things such as use a schedule to determine which bus to take. young prisoners with disabilities are among the least likely to have the skills they need to be able to hold a job. For them, education is probably the only opportunity they have to become productive, independent members of society.

I hope that this letter clarifies the requirements of the IDEA on this issue.

Thomas Hehir

Director

Office of Special Education Programs

APPENDIX L

34 C.F.R. Sec. 300.122 Exception to FAPE for certain ages

(a) General

The obligation to make FAPE available to all children with disabilities does not apply with respect to the following:

(1) Children aged 3, 4, 5, 18, 19, 20, or 21 in a State to the extent that its application to those children would be inconsistent with State law or practice, or the order of any court, respecting the provision of public education to children in one or more of those age groups.

(2)(i) Students aged 18 through 21 to the extent that State law does not require that special education and related services under Part B of the Act be provided to students with disabilities who, in the last educational placement prior to their incarceration in an adult correctional facility –

(A) Were not actually identified as being a child with a disability under Sec. 300.7; and

(B) Did not have an IEP under Part B of the Act.

(ii) The exception in paragraph (a)(2)(i) of this section does not apply to students with disabilities, aged 18 through 21, who –

(A) Had been identified as a child with disability and had received services in accordance with an IEP, but who left school prior to the incarceration; or

(B) Did not have an IEP in their last educational setting, but who had actually been identified as a "child with a disability" under Sec. 300.7.

* * *

APPENDIX M

64 Fed. Reg. 12555 (1999)

Exception to FAPE for Certain Ages (§ 300.122)

Comment: Some commenters expressed support for § 300.122(a)(2), which sets forth an exception to the FAPE requirement for certain youth who are incarcerated in adult correctional facilities, and Note 2 which includes clarifying language from the House Committee Report. A few commenters wanted the regulation to clarify the responsibility of a State where reasonable efforts to obtain prior records from the last reported educational placement have been made, but no records are available. The commenter also requested adding a note to clarify that, even if State law does not require the provision of FAPE to students with disabilities, ages 18 through 21, who, in the last educational placement prior to their incarceration in an adult correctional facility were not identified as a child with a disability and did not have an IEP under Part B of the Act, the State may choose to serve some individuals who fit within that exception and include those individuals within its Part B child count.

Discussion: Before determining that an individual is not eligible under this part to receive Part B services, the State must make reasonable efforts to obtain and review whatever information is needed to determine that the incarcerated individual had not bee identified as a child with a disability and did not have an IEP in his or her last educational placement prior to incarceration in an adult correctional facility. The steps a State takes to obtain such

information may include a review of records, and interviewing the incarcerated individual and his or her parents.

A State may include in its Part B child count an eligible incarcerated student with a disability to whom it provides FAPE, even if the State is permitted under § 300.122(a)(2) and State law to exclude that individual from eligibility. It is not necessary to provide additional clarification regarding these issues in the regulations.

Proposed Note 2 quoted from the House Committee Report on Pub. L. 105-17 which, with respect to paragraph (a)(2) of this section (relating to certain students with disabilities in adult prisons), stated that:

> The bill provides that a State may also opt not to serve individuals who, in the educational placement prior to their incarceration in adult correctional facilities, were not actually identified as a child with a disability under section 602(3) or did not have an IEP under Part B of the Act. The Committee means to * * * make clear that services need not be provided to all children who were at one time determined to be eligible under Part B of the Act. The Committee does not intend to permit the exclusion from services under part B of children who had been identified as children with disabilities and had perceived services under an IEP, but who had left school prior to their incarceration. In other words, if a child had an IEP in his or her last educational placement, the child has an IEP for purposes of this provision. The Committee added language to make clear that children with disabilities aged 18 through 21, who did not have an IEP in their last educational setting but

who had actually been identified should not be excluded from services. (H. R. Rep. No. 105-95, p. 91 (1997))

The concepts in this note are important in the implementation of this program. Appropriate substantive portions of the note should be clarified and included in the regulations. Consistent with the decision to not include notes in these final regulations, the note should be removed.

APPENDIX N

S. REP. 94-168
S. Rep. No. 168, 94TH Cong., 1ST Sess. 1975, 1975 U.S.C.C.A.N. 1425, 1975 WL 12452 (Leg.Hist.)

P.L. 94-142, EDUCATION FOR ALL HANDICAPPED CHILDREN ACT OF 1975
Senate Report (Labor and Public Welfare Committee) No. 94-168
June 2, 1975 (To accompany S. 6)
House Report (Education and Labor Committee) No. 94-332,
June 26, 1975 (To accompany H.R. 7217)
Senate Conference Report No. 94-455,
Nov. 14, 1975 (To accompany S. 6)
House Conference Report No. 94-664,
Nov. 14, 1975 (To accompany S. 6)
Cong. Record Vol. 121 (1975)
DATES OF CONSIDERATION AND PASSAGE
Senate June 18, November 19, 1975
House July 29, November 18, 1975

The Senate bill was passed in lieu of the House bill. The Senate Report and the Senate Conference Report are set out.

SENATE REPORT NO. 94-168
June 2, 1975

The Committee on Labor and Public Welfare, to which was referred the bill (S. 6) to provide financial assistance to the States for improved educational services for handicapped children having considered the same, reports favorable thereon with amendments and recommends that the bill as amended do pass.

BRIEF SUMMARY OF COMMITTEE BILL

S. 6, as reported from Committee, extends the entitlement formula for payment to States for Fiscal Year 1975 under the Education of the Handicapped Act for one additional fiscal year; adds Congressional findings and a statement of purpose section; adds definitions of certain new terms under the Education of the Handicapped Act necessary to implement the provisions of the Committee bill establishes a new entitlement formula for payments to States for fiscal years 1977 through 1979; establishes eligibility and applications provisions related thereto; establishes provisions relating to administration and evaluation responsibilities of the Commissioner of Education; and adds two new sections to the Education of the Handicapped Act relating to the employment and programs administered by any other State or local agency. Finally, to assure orderly due process with regard to carrying out the provisions of the Act and assure compliance with provisions of the Act, the Committee bill provides that the State shall establish policies and procedures to provide consultation with persons involved in or concerned with the education of handicapped children including handicapped individuals and parents of handicapped children. Further in this regard, the State shall establish an entity to assure compliance with the provisions of the Act which shall conduct periodic evaluation and be empowered to receive, and take such necessary steps as are required, to resolve complaints of violations of the requirements of the Act.

Dates for Providing Services and Priorities

Court action and State laws throughout the Nation have made clear that the right to education of handicapped children is a present right, one which is to be implemented immediately. The Committee believes that these State laws and court orders must be implemented and that the Congress of the United States has a responsibility to assure equal protection of the laws and thus to take action to assure that handicapped children throughout the United States have available to them appropriate educational services. The Committee believes that the provisions it has adopted in S. 6 reinforce this right to education, while illegible providing States and local educational agencies ample time to fulfill the full services goal. It points out that the Office of Education has adopted a goal providing full educational opportunities for all handicapped children from birth to twenty-one by 1980.

In recent information submitted to the Bureau of Education of the Handicapped forty-six states have indicated that they will provide full educational service to all handicapped children from birth to twenty-one by 1980. Further, 31 of these states have stated that they will have met this goal before 1980. The Committee bill provides an orderly and flexible timetable for the provision of these services and priorities for expenditure of Federal funds.

It provides that the State establish policies and procedures to assure that all handicapped children aged three to eighteen are provided services by September 1, 1978 and that all handicapped children aged three to twenty-one be provided services by September 1, 1980.

In order to assure that States take action to implement these dates, the Committee bill further adopts priorities for the expenditure of Federal funds geared to reaching the goal of providing services to all handicapped children. Thus, the bill requires that States establish priorities for providing a free appropriate public education to all handicapped children and that these priorities shall meet the timetables of the bill, first with respect to handicapped children who are not receiving an education and second with respect to handicapped children with the most severe handicaps who are receiving an inadequate education. The Committee stresses that the first priority must be given to meeting the timetable for handicapped children who are currently not receiving any educational services. This group of children is by fare [sic] the most neglected in the educational process and must be the first priority for State and local educational agencies.

The Committee further believes that identifying and providing services to preschool children who are handicapped is critical to assuring that these children are assisted early in life so that their handicapping conditions do not delay their educational development. It is for this reason that the Committee specifically included the three to five year old age group within the timetable for providing services by September 1, 1978. While the Committee does not include children from birth up to three within the priority or within the timetable for services, it points out that funds under the Act, as in existing law, may be spent for providing services to these children. The Committee wishes to encourage the provision of such

services to such children, and points out that early identification, screening and assessment, and parent counselling are specifically included within the definition of RELATED services which should be appropriately provided to handicapped children for this purpose.

With regard to the timetable adopted in the Committee bill the Committee points out that it has provided (in new section 614(2)(B) that with respect to handicapped children aged three to five and eighteen to twenty-one, inclusive, the requirements shall not be applied in any State if the application of such requirements would be inconsistent with State law or practice, or the order of any court, respecting public education within such age groups in the state.

This exception with respect to handicapped children aged three to five and aged eighteen to twenty-one, inclusive is intended to exempt states from the provisions of this Act establishing a timetable for providing a free appropriate public education in these age groups in the following circumstances:

(1) where State law does not authorize, or expressly prohibits, the expenditure of public funds to provide such an education to any children in these age groups;

(2) where a State does not in fact provide or assure the provision of free public education to handicapped children in these age groups; or

(3) where the education of handicapped children in a State is governed by a court order, the terms of which are inconsistent with the requirement contained in new

section 614(2)(B). This exception shall not apply in the following circumstances:

(1) where a state does now in fact provide or assure the provision of free public education to non-handicapped children in these age groups; or

(2) where a State does now in fact provide or assure the provision of free public education to handicapped children in these age groups (thus the exception being inapplicable in the case of a State which attempts to abandon the provision of such education services.

Further, this exception is in no way to be viewed as a statement of Federal policy which discourages or otherwise serves as an obstacle for the provision services to those handicapped children in the age groups to which this exception is applicable. To the contrary, the Committee intends the timetables established in new section 614(2)(B) to be viewed as a whole, thereby specifically encouraging the States to intensify their efforts to serve all handicapped children within the time periods specified in that section. In this regard it should be noted that each State's entitlement to financial assistance under this Act is based on the actual number of handicapped children aged three to twenty-one, inclusive, who are receiving special education and related services in that State. Thus, this entitlement formula has the effect of providing a bonus to those States which assure that within the specified timetables special education and related services are available to handicapped children between the ages of three and five and between the ages of eighteen and twenty-one, inclusive.

Table 2 shows the type of State laws or other legal requirements relating to the education of handicapped children by State, and includes the scope of each law, the date the law is to be implemented and the date of enactment), and the ages of eligibility for handicapped children covered by such law.

APPENDIX O

143 Cong. Rec. E. 973 (daily ed. May 19, 1997)

INDIVIDUALS WITH DISABILITIES EDUCATION ACT AMENDMENTS OF 1997

SPEECH OF HON. MATTHEW G. MARTINEZ OF CALIFORNIA IN THE HOUSE OF REPRESENTATIVES

Tuesday, May 13, 1997

Last, I would like to comment on the provisions in the bill which pertain to the provision of FAPE to juveniles who have been adjudicated as adults and are incarcerated in adult correctional facilities. Once this bill is signed into law by the President, States will be permitted to transfer the responsibility for educating juveniles with disabilities placed in adult correctional facilities from State and local educational agencies to other agencies deemed appropriate by the Governor and to allow for the modification of an individualized education plan [IEP] and the lease restrictive environment provision for bona fide security reasons and compelling penological reasons. In addition, the bill will permit public agencies to not serve juveniles who are incarcerated in adult correctional facilities who have not been identified or did not have an IEP in their last educational placement.

In exercising these new authorities, public agencies should remember that children with disabilities who are incarcerated in adult correctional facilities will be more likely to return to prison after their initial release if they do not have the educational tools to survive in life after prison. The small savings gained by not serving these

children while they are in adult correctional facilities will pale in comparison to exorbitant future costs of additional prison time or reliance on social welfare programs.

In ensuring compliance with the act, the appropriate education and/or prison official will have the obligation to determine if a youth entering the prison system had been previously identified as eligible for special education services. The prison officials should develop a system for making this determination that includes: interviews with each incoming youth under the age of 22 regarding prior special education participation, notice to each youth under the age of 22 regarding the special education process, and a procedure for contacting educational authorities, including those in correctional or juvenile institutions, to determine special education eligibility and to obtain prior special education records.

APPENDIX P

143 Cong. Rec. S4375-76 (1997)

TREATMENT OF PERSONS WITH DISABILITIES IN ADULT PRISONS

Mrs. BOXER. Mr. President, I would like to enter into a colloquy with Senators HARKIN and JEFFORDS regarding the treatment of those with disabilities who are convicted as adults and incarcerated in adult prisons.

Mr. HARKIN. I would be pleased to enter into a colloquy with my colleague, Senator BOXER.

Mrs. BOXER. As my colleagues are aware, the Department of Education has determined that the requirement that States provide eligible students with a free, appropriate public education extends to people under age 21 convicted of felonies as adults and incarcerated in adult prisons. Under current law, if a State fails to provide special education services to eligible prisoners, that State faces the loss of all Federal special education funding. I believe strongly that this mandate is wrong. I introduced legislation last week. S. 702, which would amend IDEA to exempt people convicted as adults and incarcerated in adult prisons.

This issue is particularly important to the State of California. My State does not provide special education services in adult prisons, and as a result, faces the loss of over $300 million in Federal special education assistance. It seems unconscionable to me that the needs of approximately 600,000 California special needs children could be jeopardized because my State does not provide special education services to an estimated 1,500 prisoners.

It is my understanding that this bill makes several significant amendments to these provisions and dramatically changes the scope of sanctions that can be imposed on States for failing to provide special education services to those incarcerated in adult prisons. Would the Senator elaborate on these changes?

Mr. HARKIN. Under the legislation, States are authorized to transfer the responsibility for educating juveniles with disabilities convicted as adults and incarcerated in adult prisons from State and local education agencies to other agencies deemed appropriate by the Governor, such as the State Department of Corrections.

Mrs. BOXER. What are the consequences of the transfer of authority in terms of the ability of the Secretary to withhold IDEA funds allotted to the State?

Mr. HARKIN. If a State makes such a transfer and if the Secretary finds that the public agency is in noncompliance, the Secretary must limit any withholding action to that agency. Furthermore, any reduction or withholding of payments must be proportionate to the number of disabled children in adult prisons under the supervision of that agency compared to the number served by local school districts. For example, if 1 percent of the disabled students were in adult prisons, the Secretary could only withhold 1 percent of the funds.

Mrs. BOXER. In the State of California, approximately one-fourth of 1 percent of all people eligible for special education are convicted of felonies as adults and incarcerated in adult prisons.

It is my understanding that under this bill, if California does not provide special education services in prisons it stands to lose only one-fourth of 1 percent of its allotted share. California would no longer face the possible loss of 100 percent of its allotted special education funds. I would ask the Senator from Iowa, is my understanding correct?

Mr. HARKIN. The Senator is correct that any withholding of Federal funds will be limited to the proportional share attributable to disabled students in adult prisons. Other funds would not be withheld.

Mrs. BOXER. I would ask the distinguished chairman of the committee. Mr. JEFFORDS, if he agrees that under this bill, States do not face the total loss of Federal special education funds for failing to provide special education services to those convicted as adults and incarcerated in adult prisons.

Mr. JEFFORDS. I do agree.

Mrs. BOXER. I am particularly troubled that under current law, States are required to develop an IEP for eligible students even if they have been sentenced to life without the possibility of parole or even sentenced to death. Would the Senator from Iowa comment on the authority to modify an IEP for such incarcerated individuals?

Mr. HARKIN. Public agencies may modify an IEP for bona fide security or compelling penological reasons. For example, the public agency would not be required to develop an IEP for a person convicted as an adult and incarcerated in an adult prison who is serving a life

sentence without the possibility of parole or is sentenced to death.

This exception applies to those inmates for whom special education will have no rehabilitative function for life after prison. Our aim in assuring that prisoners receive special education is to make them better able to cope after prison, resulting in a safer environment for all of us. This goal does not apply for those who will not return to society.

In addition, the provisions requiring participation of students with disabilities in statewide assessments will not apply. Further, the transition services requirements will not apply to students whose eligibility will terminate before their release from prison.

Finally, the obligation to make a free appropriate public education available to all disabled children does not apply with respect to children and 18 to 21 to the extent that State law does not require that special education and related services under this part be provided to children with disability, who, in the education placement prior to their incarceration in an adult correction facilities, were not identified as being a student with a disability, or did not have an IEP.

Mrs. BOXER. Does the legislation modify in any way the responsibilities of adult prisons to prisoners with disabilities under section 504 of the Rehabilitation Act of 1973 or the Americans With Disabilities Act?

Mr. HARKIN. No, these laws still apply.

Mrs. BOXER. Does the bill make any changes to current law with respect to disabled students incarcerated in juvenile facilities?

Mr. HARKIN. No.

Mrs. BOXER. I thank the Senator for entering into this colloquy with me.

Mr. HARKIN. I thank the Senator for raising these important issues.

Mr. JEFFORDS. Mr. President, I would make a point of order that a quorum is not present.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. WELLSTONE. Mr. President. I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. JEFFORDS. Reserving the right to object. I would like to just get us out of the situation we are in and then be happy to turn it over to morning business, if that is all right with the Senator.

Mr. WELLSTONE. I am sorry. Yes, of course.

Mr. JEFFORDS. I yield back the remainder of my time.

APPENDIX Q

TO ASSURE THE FREE APPROPRIATE PUBLIC EDUCATION OF ALL CHILDREN WITH DISABILITIES

Individuals with Disabilities Education Act, Section 618

Twenty-first Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act

U.S. Department of Education

1999

II. STUDENT CHARACTERISTICS

Special Education in Correctional Facilities

Children Ages Birth Through Five Served Under IDEA

Students Ages 6 Through 21 Served Under IDEA

Special Education in Correctional Facilities

Glossary of Terms

Adjudicated: Judicial determination (judgment) that a youth is a delinquent-status offender or an adult offender.

Committed: A court decision to place an adjudicated child in a juvenile justice program or adult corrections system.

Delinquency: Acts or conduct in violation of criminal law. When the act is committed by a juvenile, it may fall within the jurisdiction of the juvenile court, or the courts may adjudicate the individual as an adult in the adult court system.

Detention: In State or local custody, whether through secure, nonsecure, or home detention while awaiting an arraignment, adjudication, or judicial order.

Detention Center: Comparable to a jail in the adult system, a temporary, secure holding facility for juvenile offenders.

More than one in three youths who enter correctional facilities have previously received special education services, a considerably higher percentage of youths with disabilities than is found in public elementary and secondary schools (Leone, 1997). Under the Individuals with Disabilities Education Act (IDEA), youths with disabilities in correctional facilities are entitled to special education and related services. Providing appropriate services for these students, however, can be extremely challenging. Several issues have been identified as having an impact on the provision of appropriate special education services in correctional facilities, including transience of the student population, conflicting organizational goals for security and rehabilitation, shortages of adequately prepared personnel, and limited interagency coordination.

This module synthesizes available information on youths with disabilities in correctional facilities and efforts to provide this population with a free appropriate public education (FAPE). The first section describes the number and characteristics of incarcerated youths with disabilities. The second section portrays special education services in correctional facilities. The third section discusses particular challenges associated with the provision of

services in correctional facilities, and the fourth reports results for incarcerated youths with disabilities.

Number and Characteristics of Students with Disabilities in Correctional Facilities

Researchers generally agree that students with disabilities are overrepresented in the juvenile justice system. However, estimates of the number and percentage of students with disabilities in correctional facilities vary considerably (Perryman, DiGangi, & Rutherford, 1989). Data from the U.S. Department of Education, Office of Special Education Programs (OSEP) indicate that, on December 1, 1996, 15,930 students with disabilities were served in correctional facilities.[1] Youths with emotional disturbance and learning disabilities made up the majority of those incarcerated – 42 and 45 percent, respectively (see figure II-1). In a 1985 study, Rutherford, Nelson, and Wolford estimated that 9,293 youths in State adult and juvenile correctional facilities had disabilities (28 percent of the juvenile population). Of those, 80 percent were receiving special education and related services. OSEP is currently sponsoring a study that replicates the 1985 study.

Two of the reasons it is difficult to pinpoint the number and percentage of students with disabilities in correctional facilities are the wide range and varying jurisdictions of correctional facilities across the country. Incarcerated youths with disabilities may be housed in

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[1] OSEP has been collecting data on the number of students with disabilities in correctional facilities since 1987-88.

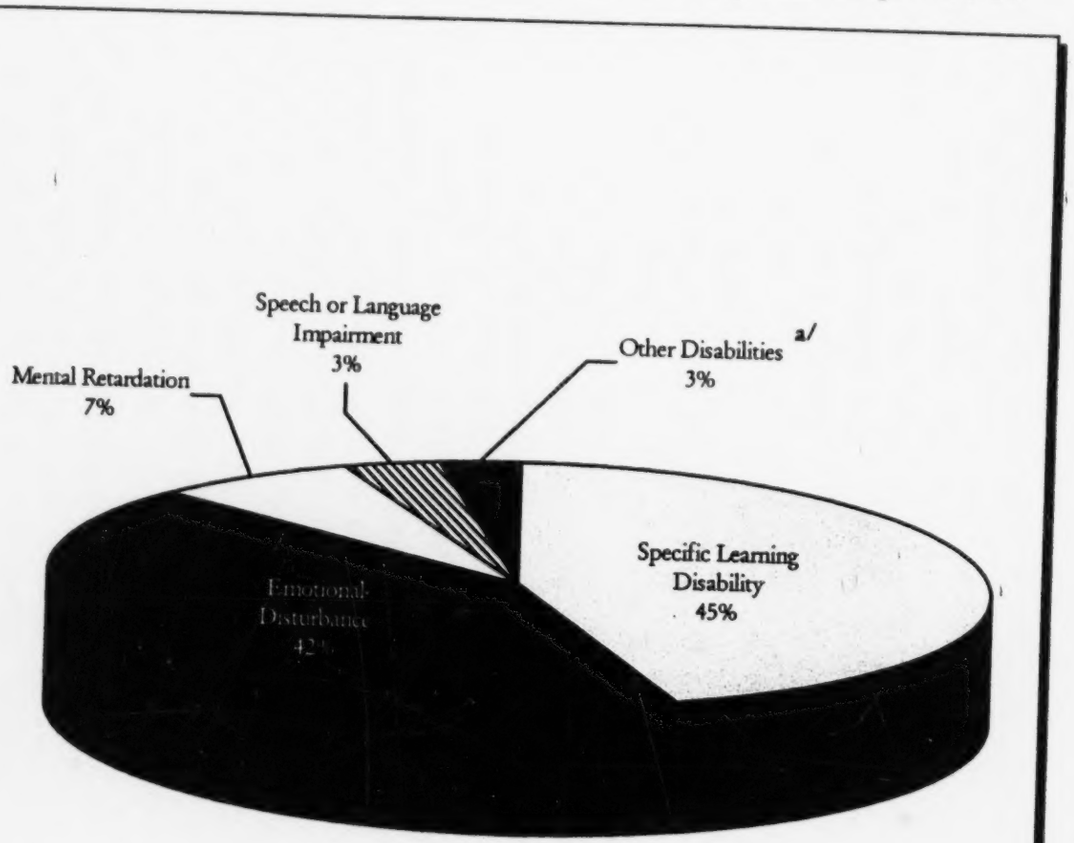
jails, detention facilities, group homes for young offenders, adult or juvenile prisons, camps, ranches, private programs, or treatment facilities.

In most instances, jails are administered by local governments. The majority of individuals confined in jails are awaiting arraignment or trial. Others are serving sentences or are awaiting transfer to other correctional facilities. Incarceration in jails is often very short; in most jails, the average incarceration is less than 72 hours (Wolford, 1987). Prisons, on the other hand, are operated at both the State and Federal levels and typically house inmates for longer periods of time (Snarr, 1987).

Juvenile halls, detention centers, and camps or ranches are specifically designed to serve juveniles. The education programs in juvenile halls and detention centers are typically modeled after secondary schools, including the provision of special education services to students with disabilities (Leone, 1987). Camps or ranches are usually smaller, and youths often split their time between school and work related to operating the facility. Smaller juvenile corrections programs, such as ranches, camps, private programs, or treatment facilities, frequently do not provide special education. OSEP monitors for these services and requires corrective action when States are not ensuring that these services are provided. Efforts are ongoing and have not yet resulted in complete compliance.

Figure II-1

Percentage of Students in Correctional Facilities by Disability: 1996-97



a/ Other disabilities include visual impairment, hearing impairment, other health impairment, orthopedic impairment, autism, traumatic brain injury, multiple disabilities, and deaf-blindness.

Source: U.S. Department of Education, Office of Special Education Programs, Data Analysis System (DANS).

What accounts for the disproportionate representation of students with disabilities among incarcerated youths? There are various theories about the relationship between delinquency and disability, but none have been adequately tested by research. One theory holds that school failure is the common link between delinquency and disability. Learning and behavioral disabilities may lead to academic failure and dropout, which, in turn, lead to delinquent behavior (Hirschi, as cited in Fink, 1990b).

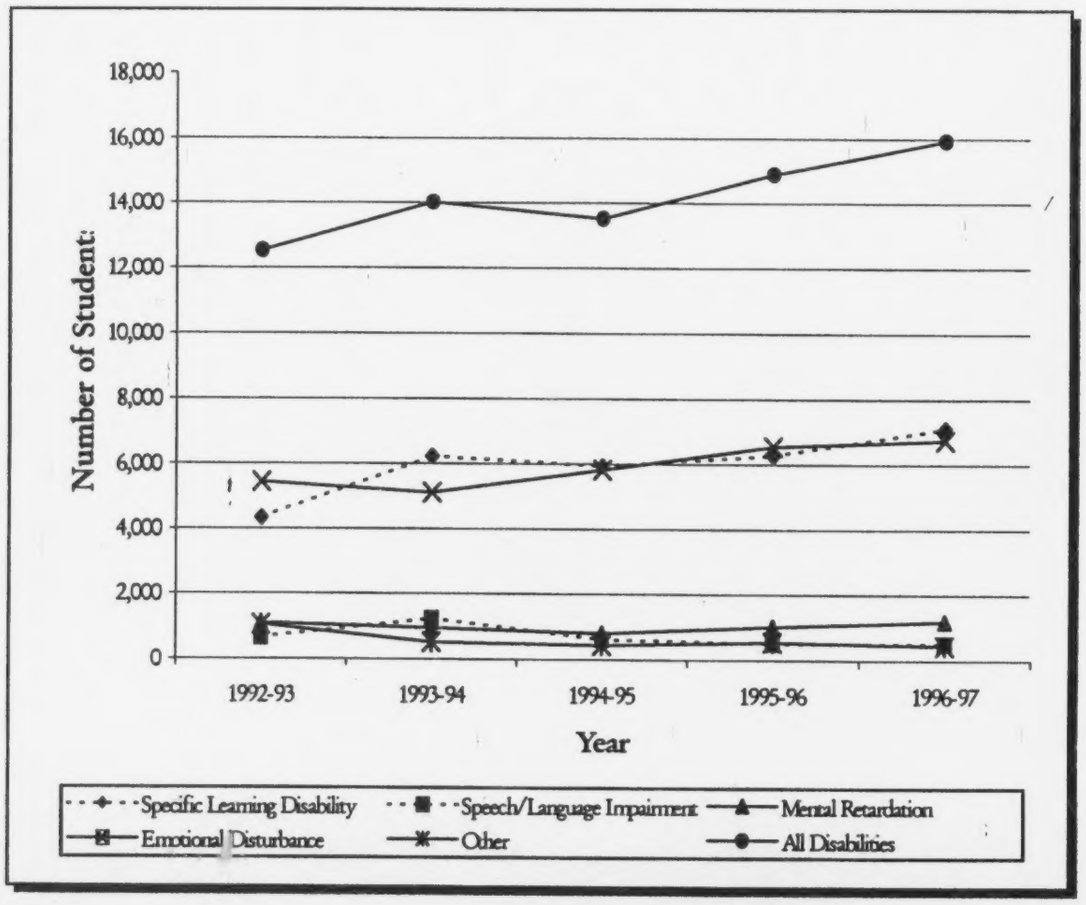
A second theory postulates that youths with disabilities exhibit certain cognitive, behavioral, and personality deficits that predispose them to delinquent behavior. These deficits – lack of impulse control, poor reception of social cues, and a diminished ability to learn from experience – may increase susceptibility to delinquent behavior (Murray, as cited in Fink, 1990b). In a study by Keilitz and Dunivant (1986), youths with learning disabilities reported committing more acts of delinquency, including stealing from a home, stealing from school, shoplifting, and damaging property, than did their peers without disabilities. Youths with learning disabilities were also more likely to commit violent acts, use marijuana and alcohol, and experience problems with school discipline (Bryan, Pearl, & Herzog, 1989).

A third theory regarding the disproportionate percentage of youths with disabilities in correctional facilities suggests that at all stages of the juvenile justice system, offenders with disabilities are treated differently from other offenders who engage in the same types of delinquent behaviors (Keilitz & Dunivant, as cited in Fink, 1990b). Consequently, delinquent youths with disabilities may be more likely than those without disabilities to be

incarcerated (Keilitz & Dunivant, 1986). They may be more likely to be apprehended by the police because they lack the skills to plan strategies, avoid detection, interact appropriately, and comprehend questions and warnings during police encounters. Wagner and colleagues (1992) found that 19 percent of all youths with disabilities were arrested by the time they had been out of school for 2 years. This was much higher than overall juvenile arrests; 5 percent of all juveniles ages 10 to 17 were arrested in 1992 (Snyder & Sickmund, 1995). The overrepresentation of offenders with disabilities in the juvenile justice system may be explained by some combination of these theories (Leone, Rutherford, & Nelson, 1991 b) or by some reason or reasons yet to be determined.

Dorm, Bullis, and Benz (1996) explored factors predicting arrest for students with disabilities. They found that, holding other variables constant, males with disabilities were 2.4 times more likely than females with disabilities to be arrested during their school career. Students with emotional disturbance were 13.3 times more likely than other students with disabilities to be arrested while in school. Students with learning disabilities were 3.9 times more likely than other students to be arrested. Dropout status and personal/social achievement also contributed to the likelihood of arrest. Youths with disabilities who dropped out of school were 5.9 times more likely than other students to be arrested, and youths with disabilities who scored low on personal/social achievement skills were 2.3 times more likely to be arrested. Furthermore, youths with disabilities who had been arrested once were far more likely to be arrested again.

Figure II-2
Number of Students in Correctional Facilities by Disability Over Time:
1992-93 to 1996-97



Source: U.S. Department of Education, Office of Special Education Programs, Data Analysis System (DANS).

Over the past several years, the number of students with disabilities in correctional facilities has risen at over twice the rate of the overall special education population. From 1992-93 to 1996-97, the number of students ages 6 through 21 with disabilities increased 13 percent; the number in correctional facilities increased 28 percent. The increase in incarcerated youths can be seen most in juveniles with learning disabilities and emotional disturbance; these two disabilities also account for the largest percentage of juveniles with disabilities in correctional facilities (see figure II-2). The number of incarcerated youths with other disabilities has remained relatively stable over time. It is not clear whether this increase is due to an actual rise in the number of youths with these disabilities committing crimes or a result of correctional facilities' greater efforts to identify and serve a higher proportion of IDEA-eligible youths.

Providing FAPE for Students with Disabilities in Correctional Facilities

IDEA ensures that students with disabilities will receive FAPE, and these assurances clearly extend to students in correctional facilities. In the landmark case *Green v. Johnson* (1981), the U.S. District Court of Massachusetts ruled that students with disabilities do not forfeit their rights to an appropriate education because of incarceration (Grande & Oseroff, 1991). However, the provisions of IDEA were developed with school settings in mind. This can make the implementation of IDEA in correctional facilities particularly challenging. Furthermore, the IDEA

Amendments of 1997 limited the State's obligation somewhat in providing special education in correctional facilities. The IDEA Amendments of 1997 revised the eligibility provisions so that States may choose not to provide special education services to youths with disabilities, ages 18 through 21, who, in the educational placement prior to their incarceration in an adult correctional facility: (a) were not actually identified as being a child with a disability under IDEA or (b) did not have an individualized education program (IEP) under IDEA. The new act provides that youths with disabilities who are convicted as adults and in adult prisons need not participate in general educational assessment programs conducted by the State and that the transition planning and services provisions of IDEA do not apply to these individuals if their eligibility under IDEA will end because of their age before they will be released from prison. The educational program and placement of youths with disabilities who are convicted as adults and in adult prisons can be modified by their IEP teams to accommodate bona fide security or compelling penological interests. A State also may provide that when individuals with a disability reach the age of majority under State law, all rights accorded to their parents transfer to those individuals who are incarcerated in an adult or juvenile Federal, State, or local correctional institution.

The availability of special education services varies considerably by type of correctional facility and also from State to State. Thirty-six States responding to a national survey reported providing special education services in

an average of 92 percent of their State's juvenile correctional facilities (Kirshstein & Best, 1996). Educational programs in adult jails and prisons are generally less extensive than those in juvenile facilities; special education services are only occasionally provided, and with varying levels of intensity (Leone, 1987; Rutherford et al., 1985; Wolford, 1987). In 1990-91, 33 of 42 States reported providing special education services in some adult correctional facilities. On average, 33 percent of institutions in those States provided special education services (Kirshstein & Best, 1996). An interesting footnote to these figures is a 1998 ruling by the U.S. Supreme Court. In *Pennsylvania Department of Corrections v. Yeskey*, the court ruled in favor of an inmate with high blood pressure who was denied access to a boot camp program, which would have reduced the length of his incarceration. The court ruled that inmates are covered under the Americans with Disabilities Act of 1990 and, as such, regardless of their age, they may be entitled to accommodations in education programs offered in correctional facilities. The impact of this decision, if any, on the provision of special education services in correctional facilities remains to be seen.

States also differ in the structure of their corrections education programs. In some States, corrections schools are decentralized, and a warden or institutional superintendent directs each school. In these cases, noneducators are responsible for making educational decisions. In other States, a corrections education supervisor within a bureau oversees education across institutions. The State education agency (SEA) may also extend rights and responsibilities of a local education agency to the corrections

education organization. In 1990, 21 youth and adult corrections education programs were characterized as decentralized, 48 were overseen by State bureaus, and 18 were housed in school districts (Gehring, 1990).

Below, literature on efforts to provide FAPE for youths with disabilities in correctional facilities is summarized. Issues associated with identification and assessment, IEP development, provision of services, and personnel are addressed.

Identifying and Assessing Children with Disabilities

IDEA requires that States identify, locate, and evaluate all children with disabilities residing in the State who need special education and related services. Education agencies are responsible for conducting a full, individual evaluation to determine whether a child is eligible for services under IDEA and to determine the educational needs of the child. This requirement generally applies to youths in correctional facilities as well as those in more typical educational settings.

Youths with disabilities in correctional facilities may have received special education services in their previous school, or they may have a disability that was not previously identified. Without access to school records, it can be difficult for corrections personnel to identify youths previously served in special education because the exchange of information between public schools and correctional facilities can be problematic (Lewis, Schwartz, & Ianacone, 1988). In one study, school officials reported learning about a youth's incarceration through informal means of communication. Staff in correctional facilities

reported that some school districts refused to release student records without parental permission, delaying the identification of students with disabilities and the provision of appropriate services (Leone, 1994). In fact, Moran (1991) found it was not uncommon for youths to have exited the correctional system by the time their school records arrived.

Identification and assessment may also be difficult if corrections educators do not have adequate support for identifying youths with disabilities (e.g., school psychologists, social workers, special education administrators). In a case study of one State's juvenile justice facilities, Leone (1994) found that juvenile correctional facilities only provided special education services to youths who had been previously identified as eligible for special education. The juvenile justice department made no independent efforts to evaluate youths' eligibility for special education. Furthermore, at the time of the interviews, staff revealed that there was a backlog of over 4 months in the processing of files for students previously identified as having disabilities. For example, one student who had received special education services in public school waited 9 months after his incarceration before a multidisciplinary team met and placed him in an appropriate program. During the study, the State department of juvenile justice took steps to address these delays (Leone, 1994).

More than a dozen class action suits brought against correctional facilities since 1990 have addressed the issue of identification and assessment (e.g., *John A. v. Castle* (1990), *D.B. v. Casey* (1991), *W.C. v. DeBruyn* (1990), *Horton*

v. Williams (1994)). In *Andre H. v. Sobol* (1984), the plaintiffs claimed that the detention holding facility did not conduct any screening or child find activities, did not convene any multidisciplinary team meetings, and did not make any attempts to get records from youths' previous schools. The case was settled out of court 7 years after initiation (Leone & Meisel, 1997). In *Smith v. Wheaton* (1987), a school was accused of failing to meet timelines for evaluating youths for special education eligibility or developing IEPs. The plaintiffs also asserted that major components of IDEA were not being followed, such as providing related services (e.g., counseling, occupational therapy) and creating transition plans. After an 11-year legal battle, the courts ruled that juvenile detention facilities must provide a broad array of educational and rehabilitative services (Becker, 1999). Furthermore, school districts must promptly release school records to the facility when a child is incarcerated, as well as ensure appropriate special education placements upon the child's release (Connecticut Legal Services, 1999). These cases demonstrate the nature of the difficulties in identifying and assessing the special education needs of students with disabilities in correctional facilities.

When the school district is the entity responsible for serving incarcerated youths, some of the identification problems can be avoided. For example, in the Fairfax County, Virginia Juvenile Detention Center, a youth's most recent school – referred to as the base school – is contacted immediately upon the youth's arrival, and the process for obtaining records is initiated. Because the school program in the Detention Center is officially part of the county school system, the school system messenger

service delivers records from the base school to the detention center. This speeds the identification of students previously served in special education. In many cases, records arrive the same day. If a youth is suspected of having a previously unidentified disability, the base school is contacted to schedule an assessment by county school system personnel. Staff at the juvenile detention center stress the importance of maintaining good personal relations with staff in community schools to facilitate the identification and assessment process (Markowitz, 1998).

IEP Development

Once youths are found eligible for special education services under IDEA, they are entitled to an IEP. This written plan must include statements of (1) the child's present levels of performance; (2) annual goals, including short-term objectives; (3) special education and related services; and; (4) program modifications or supports. For youths ages 14 and older in juvenile facilities, the IEP must also include a plan for the transition from secondary school to postsecondary roles. The IEP team – including teachers, parents, and, when appropriate, the youth – is required to meet annually to update the student's present levels of performance, goals and objectives, services, and supports.

Providing Special Education and Related Services

The curriculum used in juvenile facilities often parallels that used in local school districts; curriculums in adult

facilities are usually modeled on adult education programs, with the GED or high school equivalency as the credential earned. Regardless, the curriculum and service delivery system may not meet student needs. Researchers suggest that the components of an effective corrections special education program include: (1) a functional assessment that uses ongoing measurement to identify discrepancies between a predetermined curriculum or program standard and the youth's level of educational achievement, social/vocational adjustment, and ability to function independently; (2) a functional curriculum that meets a student's individual needs, including social, daily living, and vocational skills; (3) functional instruction that uses positive and direct instructional strategies; (4) vocational training opportunities; (5) transition services; (6) a full range of educational and related services; and (7) professional development for educators and staff (Bullock & McArthur, 1994; Forbes, 1991; Leone, Rutherford, & Nelson, 1991a; Leone, Rutherford, & Nelson, 1991b; Rutherford, Nelson, & Wolford, 1985).

Further, research suggests that effective and ineffective rehabilitation programs differ in a variety of ways. Effective programs are distinctive in the types of intervention they provide, their duration and intensity, the characteristics of staff, the relationship between the staff and offenders, and the extent to which the programs address the social and economic factors affecting offenders (Gendreau & Ross, as cited in Ross & Fabiano, 1985; MacKenzie, 1997). By identifying changeable behavior characteristics, the conceptualization of delinquent behavior is also a critical factor driving the development

and implementation of rehabilitation programs. In addition to addressing the offender's environment, feelings, behavior, and vocational skills, effective programs also use a cognitive behavioral and social learning approach. They include techniques to improve reasoning skills, empathy, and awareness of behavioral consequences (MacKenzie, 1997; Ross & Fabiano, 1985).

Research suggests that these ideals are rarely met. In his case study of one State's juvenile corrections system, Leone (1994) reported that few IEP meetings were held. Staff reportedly prepared IEPs based on school records and circulated the IEP to several staff members who reviewed and signed it. Involving parents in IEP meetings was particularly difficult. Parents were frequently sent notices of IEP meetings, but they rarely attended, and this was also true of surrogate parents appointed by the State. Similar issues were noted in a number of suits against juvenile and adult correctional programs (e.g., *Melvin v. Schilling* (1991), *T. Y. v. Shawnee County* (1994), *E.R. v. McDonnell* (1994)). Parents of youths in correctional facilities are reported to miss many hours of work handling court-related matters and may not have the flexibility to attend IEP meetings (Markowitz, 1998).

Furthermore, Leone found that students with disabilities in correctional facilities received considerably less intensive special education programming than they had in public schools (7 to 7½ class periods per week compared to 19½ to 22½ periods per week). It appeared from the review of records that students received one or two periods of special education service per day, regardless of their level of need. Few students received speech therapy, and none received counseling or psychological services

despite the fact that a number of these youths received such services prior to incarceration. Leone also found that none of the IEP goals or objectives addressed the transition of students from correctional facilities to their home communities or other institutions (Leone, 1994).

Moran (1991) described some of the difficulties associated with providing special education services within correctional facilities. The time available for providing special education services often conflicted with higher priority activities, such as meeting with attorneys, meeting with probation counselors, appearing in court, or attending other scheduled classes. Depending on the availability of staff and scheduling in residential units, special education teachers would sometimes have to escort youths from the residential unit to the school facility. Limitations on the number of youths who could be escorted without assistance reduced the number served at any one time. In addition, dormitory confinement was used as a common disciplinary tool, and, during confinement, youths, in many cases, did not attend school or receive special education services. Services are provided to students in confinement in some systems.

Much attention has been given to the interpretation of the IDEA Amendments of 1997 requirement that students with disabilities be served in the least restrictive environment. The law holds that

> to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the

> general educational environment occurs only when the nature or severity of the disability of a child is such that education in general classes with the use of supplementary aids and services cannot be achieved satisfactorily. (§ 612(a)(5)(A))

Interpreting the application of this mandate within the confines of a correctional facility is particularly difficult. Some researchers have labeled correctional facilities *the most restrictive environment* (Rutherford et al., 1985). Nonetheless, youths with disabilities in correctional facilities may receive educational services with nondisabled, incarcerated peers.

IDEA does provide some flexibility for placing adjudicated youths with disabilities in the least restrictive environment. The Act states that if a child with a disability is convicted as an adult under State law and incarcerated in an adult prison, the IEP team may modify the child's IEP or placement if the State demonstrates a *bona fide* security concern or compelling penalogical interest that cannot otherwise be accommodated (§ 614(d)(6)). However, this has the potential to magnify existing tensions between security and education, especially if there are funding cuts. With budget constraints, a correctional facility could seek to reduce special education and/or regular education services in order to ensure proper security.

The IDEA Amendments of 1997 specify that requirements for transition planning and transition services do not apply to children convicted as adults and incarcerated in adult prisons whose IDEA eligibility will end, because of their age, before they are released from prison. However, for youths 14 and older in *juvenile* facilities, IEPs must

include a statement of transition needs and, if appropriate, services. Transition services may be the most neglected aspect of corrections special education programs as cooperation among public schools, community agencies, and correctional facilities is rare (Leone et al., 1991b). Virtually every facility in Florida reported deficiencies and fragmentation in the transition of incarcerated youths with disabilities back to their communities (Florida Department of Education, 1995).

Few States have education laws or regulations for corrections education, few corrections education programs are accredited, and there are no mandatory standards for corrections education programs in adult institutions except those requirements of IDEA applicable to students with disabilities. The lack of standards makes it difficult to provide quality special education services because the necessary general education infrastructure and supports on which special education rests are often inadequate. They may not meet such basic State requirements as professional development, space, or ventilation (Leone & Meisel, 1997).

Monitoring the quality of corrections education programs or corrections special education programs is also difficult without accepted standards of practice (Leone & Meisel, 1997). While State education agencies are responsible for monitoring the implementation of IDEA in correctional facilities, such monitoring has been limited (Leone, 1994; Wolford, 1987). In response, the courts have become a mechanism of last resort for securing services for youths in correctional facilities under IDEA.

Ensuring an Adequte Supply of Personnel

Providing appropriate special education services requires an adequate supply of qualified personnel. Under IDEA, each State must have in effect a comprehensive system of personnel development (CSPD) that is designed to ensure an adequate supply of qualified special education, general education, and related services personnel. The SEA must establish and maintain standards to ensure that personnel are appropriately and adequately prepared, and personnel standards must be consistent with State-approved or State-recognized professional requirements. This section summarizes literature on the need for administrators and general and special education service providers to work with incarcerated students with disabilities.

Providing special education services for youths in juvenile and adult correctional facilities is relatively new, and many corrections administrators may not have the necessary experience or expertise (Schrag, 1995). In a survey of nine States, a number of administrative factors were found to be crucial for providing appropriate special education services in correctional facilities. These included: (1) removing barriers that restrict the access of students with disabilities to general education programs, classrooms, and activities; (2) ensuring that all facilities and/or programs are in full compliance with Federal and State laws, including procedural safeguards; (3) ensuring that corrections education programs have written philosophies and clear goals developed in coordination with all staff and communicated to students, legislative and community agencies, public schools, and the community at large; (4) ensuring that administrators have adequate

education credentials and the authority to make budgetary, personnel, and programmatic decisions; (5) using teacher recruitment practices that attract highly qualified staff; and (6) providing school staff with access to ongoing professional development in the areas of legal developments, research, and evaluation (Schrag, 1995).

In light of the range of disabilities that young offenders exhibit, direct services personnel in correctional facilities must be specifically prepared to address a diverse array of educational needs. The fact that these students are incarcerated calls for special educators to supplement their skills with a better understanding of the subculture of offenders (Nelson, Rutherford, & Wolford, 1987) and learn skills to teach adaptive behavior (Western Regional Resource Center, 1993), conflict resolution, and goal setting (Florida Department of Education, 1995).

Leone (1987) delineated competencies for corrections special educators. These competencies include the ability to: (1) apply knowledge of legislation and regulations governing the education of incarcerated students with disabilities, (2) identify and assess students suspected of having disabilities, (3) develop instructional goals and objectives for individual students, (4) use a variety of instructional strategies for presenting material, (5) monitor student progress and adjust instruction accordingly, (6) teach students to monitor their own academic progress and assume greater responsibility for their learning, (7) design and adapt instructional materials to meet student needs, and (8) effectively use behavioral strategies to promote prosocial behavior (Leone, 1987). Bullock and McArthur (1994) listed similar skills but added vocational education and team skills as necessary components in a

correctional educator's repertoire. Finally, Leone (1987) identified political skills as critical for successful corrections special education personnel in that teachers must understand the relationships among agencies and work within the system to improve the quality of educational services they provide.

Obtaining accurate information about the number of special education teachers working within juvenile correctional settings, as well as the projected need for these specially trained teachers, is challenging. Surveys suggest that the number of certified special education teachers in juvenile corrections is not adequate for the number of students identified (Leone et al., 1991b; Rutherford et al., 1985). Hiring new personnel who are qualified to provide special education and related services in correctional facilities can be extremely difficult (Fink, 1990a), and the lack of definitive personnel data has inhibited the emergence of specialized programs on corrections special education in institutions of higher education.

Litigation against juvenile and adult correctional facilities has been one mechanism for addressing shortcomings in the availability of adequately qualified special education personnel. Personnel issues have been addressed in at least 10 such cases since 1990. An example is *T.I. v. Delia* (1990), in which plaintiffs alleged that Kings County Detention Center in Washington was overcrowded, understaffed, unsafe, and failed to provide adequate education, treatment, and recreation. As part of the consent decree, the Seattle School District agreed to employ two full-time certified special education teachers in addition to six full-time general education teachers at the facility, encourage general educators to obtain special education

certification, and fill new teacher vacancies with certified special educators. The district agreed that the facility's two special education teachers would teach only those youths eligible for special education services unless the population of students with disabilities diminished.

Some promising strategies have been developed to address the professional development needs of teachers in correctional facilities. For example, computerbased expert systems are one approach to addressing the information and training needs of general educators who work with incarcerated students with disabilities. Expert systems are programmed to arrive at decisions using information provided by the user and the expert. For example, one system – SNAP (Smart Needs Assessment Program) – was specifically designed for general education teachers who had special education students in their classes. To use SNAP, teachers identify problem situations in their classrooms and query the expert system for recommended behavioral strategies or teaching/learning strategies. An evaluation of SNAP showed positive results in an adult corrections education program, and teachers responded favorably to the system (Fink, 1990a).

Challenges To Providing FAPE in Correctional Facilities

Meeting the requirements of IDEA in correctional facilities is a daunting task. Coffey and Gemignani (1994) suggest that there is a poor fit between Federal rules and regulations and the reality of correctional facilities. There are many unique and significant challenges associated with the provision of services in these settings, which are often not conducive to learning (Florida Department of

Education, 1995). Some of those challenges are discussed below.

Custody and supervision are often seen as the primary functions of correctional facilities. Conflict between the goals of rehabilitation and punishment can have far-reaching consequences. Judges, for example, rarely make sentencing or placement decisions that account for the offender's need for special education services (Rutherford et al., 1985). Youths identified in school as having a disability receive special education and related services based on their educational needs. In the juvenile justice system, youths are likely to be served according to the severity of their crime and the length of their sentence. Institutional security and housing or work assignment take priority over educational needs (Nelson, 1996; Wolford, 1987). Disciplinary procedures within correctional facilities may not take into account the needs and characteristics of youths with disabilities, and corrections industries may not provide adequate vocational training (Leone, 1994).

Compared to youths without disabilities, youths with disabilities in correctional facilities receive a disproportionate number of disciplinary actions (Buser, as cited in Leone, 1994; Walter, as cited in Leone, 1994). On average, youths with disabilities received a major disciplinary action once every 25.8 days compared to once every 35.3 days for students without disabilities (Leone, 1994). The types of disciplinary action used in correctional facilities may also limit access to educational services. Segregation or confinement is a common form of discipline; it typically includes temporary removal from educational services. Youths with disabilities spent more time in

disciplinary confinement than youth [sic] without disabilities (Buser, as cited in Leone, 1994; Buser, Leone, & Bannon, 1987; Leone, 1994). This can be particularly problematic for youths with potential mental health problems, who spent 20.4 percent of their time in disciplinary confinement as compared to 12.3 percent for the youths in special education and 5.6 percent for those not in special education (Leone, 1994).

Correctional facilities often stress employment in corrections industry rather than vocational education, providing further evidence of the relatively low priority afforded to education. Very few correctional facilities have formal vocational education programs that provide offenders with marketable skills and assistance in employment planning (Rutherford et al., 1985). Furthermore, the existing vocational education programs often exclude youths with disabilities because they do not have a high school diploma, adequate reading skills, or other prerequisite skills (Rutherford et al., 1985).

The provision of appropriate special education services in correctional facilities is also confounded [sic] by the high rate of mobility among incarcerated youths. A young person may be incarcerated for a short period of time or may be transferred frequently. For example, in the Fairfax County, Virginia Detention Center, youths typically stay 2 to 3 weeks (Markowitz, 1998). This is consistent with the national average length of confinement of 15 days in juvenile detention centers (Abt, 1994). Identification of disabilities may be difficult if youths do not stay in any one correctional facility for very long. The special education assessment and eligibility determination process can be lengthy, and it may not be complete when youths are

transferred. The mobility and varying length of time spent in facilities may interfere with educational programming and the continuity of special education services provided (Schrag, 1995). As youths move from one facility to another or from community schools to correctional facilities, they likely face changes in curriculum, instructional techniques, and educational expectations. These may all interfere with the teaching and learning process.

This high rate of mobility also contributes to difficulties with interagency coordination. Youthful offenders are served by numerous public agencies as they work their way through the juvenile justice or adult corrections systems. These agencies may include the courts, social service agencies, detention centers, group homes, rehabilitation programs, school programs, and correctional institutions. When schools are not informed that youths are incarcerated, information about special education needs cannot be transferred. Even when schools are informed of incarceration, IEPs and other pertinent information may not be transferred because of poor or inadequate coordination with the school system (Schrag, 1995). This presents a problem for the correctional facility because resources needed for assessment of such youths typically are not readily available in the facility. A lack of guidelines or written procedures for the exchange of information (e.g., notification of incarceration and exchange of records) interferes with the transition of students into and out of correctional facilities.

Transition of youths from the correctional facility back into school and/or the community is extremely difficult (Leone, 1994). A successful transition to the community

requires the coordinated efforts of institutional staff, families, probation and aftercare professionals, and educators (Leone et al., 1991a). The availability of integrated support services (e.g., counseling, career planning, and social work services) to improve this transition is limited. Corrections education programs that serve a large region or a whole State are further challenged by interagency coordination because this necessitates working with personnel and procedures from multiple schools and agencies (Markowitz, 1998).

Results for Students with Disabilities in Correctional Facilities

An important part of the discussion regarding students with disabilities in correctional facilities is their academic achievement and transition back into the community. Unfortunately, minimal data are available on results for this population, such as high school completion, postsecondary enrollment, employment, or recidivism. This section summarizes the information that is available.

Data from a variety of sources suggest that students with disabilities in correctional facilities are less likely than other youths with disabilities to complete high school or to make a successful transition from a corrections education program to a community-based school. In Pennsylvania, of the 959 youths with disabilities through age 21 in juvenile and State correctional facilities, 3.1 percent had a high school diploma or GED compared to 21.7 percent of incarcerated youths without disabilities (N. Heyman, personal communication, April 7, 1998). Of students with

disabilities exiting correctional special education programs in Maryland, 6.4 percent graduated from high school compared to 64.0 percent of all students with disabilities in the State. A far greater percentage of Maryland's youths with disabilities in correctional facilities reached the maximum age for special education services without completing high school, 83.0 percent (E. Featherstone, personal communication, March 17, 1998). Incarcerated students with disabilities may also have difficulty with the transition to a community-based high school once they are released. In a Florida study, 25 to 45 percent of incarcerated students with disabilities did not return to a comprehensive public high school after their release (Florida Department of Education, 1995).

Some efforts to improve transition services have shown promise, however. An intermediate school district in Wisconsin developed the Youth Reentry Specialist (YRS) program. This program employed a trained reentry specialist to foster the transition of youths with disabilities from correctional facilities to public schools, vocational rehabilitation, vocational education, job training programs, or work programs. An evaluation found that, of white youths without YRS services who left the correctional facility school with five high school credits, only 13 percent made a successful transition into a special education program and were in a vocational program 3 months after release. Of white youths with YRS services, 40 percent made a successful transition into special and vocational education. Black males were somewhat more likely than whites to have a successful transition – 25 percent without YRS services, and 60 percent with YRS services (Karcz, 1996).

In a similar effort, the Networking and Evaluation Team (NET) was designed to help local schools and the Washington State Division of Juvenile Rehabilitation coordinate and plan for youths' educational needs as they moved to and from corrections education programs. This was done by building awareness of other agencies' activities, enhancing the transfer of educational records, conducting preplacement planning before youths left correctional facilities, and maintaining communication between community and corrections educators. Available data suggest that the NET model was associated with improved student retention (Webb & Maddox, 1986).

Conclusions

Efforts have been made to improve corrections education by implementing a national policy for corrections education and developing standards for administration. However, no formalized process has been established for measuring compliance with these standards or for using measures as the basis for certification or accreditation of corrections schools or school systems (Coffey & Gemignani, 1994). Furthermore, no specific standards have been developed for guiding development of corrections special education programs.

State, regional, or national efforts are required to provide standards of best practice and resources for technical assistance. Given the relatively small number of special educators within correctional facilities and the broad scope of their responsibilities, these individuals cannot be expected to design, implement, and evaluate their own special education programs. Rather, this is an area in

which State education agency personnel or regional staff might provide assistance and leadership. Technical assistance to correctional facilities could be provided to design educational programs that comply with curriculum standards and graduation requirements, as well as meet the unique needs of the students with disabilities (Florida Department of Education, 1995). Furthermore, coordination among State agencies that work with incarcerated youths could be enhanced through new channels of communication and timely exchange of records.

State and local agencies may also facilitate transition of incarcerated youths back into the community. A comprehensive transition program requires referral, program placement, and followup. Each phase is important in enhancing the odds of a successful transition. Selected studies have shown the benefits of transition services for youths with disabilities moving from correctional facilities to community-based school or work sites.

The professional development needs of the academic staff in correctional facilities are well-documented, most specifically in the area of special education (Coffey & Gemignani, 1994, Rutherford et al., 1985). Teachers need specialized training to work with offender populations. Because relatively few prospective teachers enter corrections education, institutions of higher education cannot justify preservice programs geared toward this particular subspecialty. Consequently, inservice training is essential. A State or regional comprehensive personnel development program that is aligned with State standards is required for enhancing the skills of correctional special educators.

Finally, to better assess the adequacy of corrections special education programs, State and local agencies should consider conducting results-based evaluations of their programs. These evaluations might include data on an array of results for youths with disabilities, including successful transition to community-based education programs, high school completion, mastery of State content standards, postsecondary employment, social adjustment, enrollment in postsecondary education programs, and recidivism. The evaluations could be linked with State standards so evaluation results can be used to inform professional development activities, guide reforms in curriculum and instruction, and generally improve corrections special education programs.

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OPPOSITION

BRIEF

Supreme Court, U.S.
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No. 00-1076

In The

Supreme Court of the United States

SUNSIRAE TUNSTALL, a minor, by and through her mother, TANYA TUNSTALL, et al.,

Petitioners,

vs.

THERESA BERGESON, Superintendent of Public Instruction, et al.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Washington

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QUESTION PRESENTED

Should this court accept certiorari to review the decision of Washington State's highest court that neither the Washington State Constitution nor Washington statutes authorize or obligate local school districts to provide special education to incarcerated felons ages 18-21?

TABLE OF CONTENTS

Page

QUESTION PRESENTED..... i

JURISDICTION..... 1

STATEMENT OF THE CASE..... 1

REASONS FOR DENYING THE WRIT..... 2

A. This matter does not merit certiorari as to the School Districts because the petitioners raise no issue as to the School Districts..... 3

B. This matter does not merit review as to the School Districts because the Washington State Supreme Court rested its decision as to the School Districts on independent and adequate state grounds..... 4

C. Prior to 1997, federal law did not require the State to provide special education to inmates incarcerated in adult prisons for criminal conduct unrelated to their disability..... 6

D. As currently enacted, the IDEA does not require Washington to provide special education to inmates age 18 and older..... 9

E. Petitioner's interpretation of IDEA would result in absurd consequences..... 11

CONCLUSION..... 14

TABLE OF AUTHORITIES

Page

CASES

Amos v. Maryland Dept. of Public Safety & Correction Services, 126 F.3d 589 (4th Cir. 1997) 9

Board of Educ. v. Rowley, 458 U.S. 176, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982) 13

Daniel R.R. v. State Board of Educ., 874 F.2d 1036 (5th Cir. 1989) 12

Doe v. Board of Educ. of Oak Park & River Forest High Sch. Dist. 200, 115 F.3d 1273 (7th Cir.), *cert. denied*, 118 S. Ct. 564 (1964) 6, 7, 8

Doe v. Maher, 793 F.2d 1470 (9th Cir. 1986) 6, 8

Gill v. Columbia Sch. Dist., 217 F.3d 1027 (8th Cir. 2000) 13

Honig v. Doe, 484 U.S. 686 (1988) 6, 8

Lynum v. Illinois, 368 U.S. 908, 82 S. Ct. 190, 7 L. Ed. 2d 128 (1961) 4

Merrifield v. Lake Central Sch. Corp., 770 F. Supp. 968 (N.D. Ind. 1991) 10

Metzger v. Parrott, 233 U.S. 36, 34 S. Ct. 575, 58 L. Ed. 837 (1914) 4, 5

Michigan v. Long, 463 U.S. 1032, 103 S. Ct. 3469, 77 L. Ed. 2d 1201 (1983) 4

Moses Lake Dist. v. Big Bend College, 81 Wash.2d 551, 503 P.2d 86 (1972) 4

New Hampshire v. Adams, 159 F.3d 680 (1st Cir. 1998) 6

Oak Harbor Sch. Dist. v. Oak Harbor Educ. Assoc., 86 Wash.2d 497, 545 P.2d 1197 (1976) 4

TABLE OF AUTHORITIES – Continued

Page

Peter v. Wedl, 155 F.3d 992 (8th Cir. 1998) 9

Seattle Sch. Dist. v. State, 90 Wash.2d 476, 585 P.2d 71 (1978) 5

Tunstall v. Bergeson, 141 Wn.2d 201, 5 P.3d 691 (2000) 8, 10, 11

Virginia Dept. of Educ. v. Riley, 106 F.3d 559 (4th Cir. 1997) 6, 7, 9

Yankton Sch. Dist. v. Schramm, 93 F.3d 1369 (8th Cir. 1996) 10

STATUTES, RULES AND CONSTITUTIONAL PROVISIONS

Individuals With Disabilities Educ. Act, 20 U.S.C. § 1400-1456 6

34 C.F.R. § 300.122 10

OTHER AUTHORITIES

Mark J. Murphy, Note, *Residential Placement of Handicapped Children: Altering the Scope of a Public Education*, 43 U. Pitt. L. Rev. 789 (1982) 13

JURISDICTION

Petitioners assert jurisdiction under 28 U.S.C. § 1257. As argued more fully below, this Court does not have jurisdiction over this matter as to Cape Flattery, Cheney, Monroe, Peninsula, Shelton, Steilacoom Historical, and Walla Walla School Districts because the Washington State Supreme Court decision as to the Respondent School Districts rests on independent and adequate state grounds.

STATEMENT OF THE CASE

Petitioners are a class of incarcerated felons, age 18- to 21-years-old. Petitioners seek review of the Washington State Supreme Court decision that Washington State law does not place a duty on local school districts to provide special education to 18- to 21-year-old felons incarcerated in Washington adult correctional facilities, nor does federal law impose this duty.

Respondents herein are the Cape Flattery, Cheney, Monroe, Peninsula, Shelton, Steilacoom Historical, and Walla Walla School Districts (hereafter collectively School Districts). The School Districts are the quasi-municipal corporations organized to provide legislatively defined, authorized and funded educational services for the geographic districts in which the adult correctional facilities are located. Pet. App. 35, 53-54. The Department of Corrections (DOC) operates the adult correctional facilities and has custody and authority over the inmates. Pet. App. 55-56.

In proceedings below, the trial court held that while the Washington State Constitution imposed a duty on the State of Washington to provide education to prisoners of the Department of Corrections, neither the Washington State Constitution nor Washington State laws placed that duty on the School Districts. Pet. App. 79-80.

Similarly, the Washington State Supreme Court affirmed that the Washington State Constitution did not place a duty to educate on school districts. Pet. App. 36. The State court affirmed that a Washington school district is a creature of statute that exists only within its legislative contours. Pet. App. 35.

The Washington State Supreme Court held that the Washington State Legislature had not obligated the School Districts to provide any of the state or federally mandated education to the inmates. Pet. App. 34-46. Prior to 1998, the Washington State Legislature had not provided funding or authority for the School Districts to enter adult correctional facilities. Pet. App. 56. In 1998, the Washington State Legislature implemented a statutory scheme by which the School Districts could contract to provide such services. Pet. App. 60-61. If the School Districts chose not to enter into such a contract, the designated provider would be a separate educational service district, not the School Districts. Pet. App. 36, 61.

REASONS FOR DENYING THE WRIT

The Court should deny the writ as to the School Districts because the Washington State Supreme Court

decision as to the School Districts rests on independent state grounds. Petitioners failed to set forth in their Petition any contention that federal law places a duty on the School Districts rather than on the State of Washington. Further, Petitioners argue that the Washington State Supreme Court misinterpreted federal law in issuing its decision. This is incorrect. This Court should deny the writ.

A. This matter does not merit certiorari as to the School Districts because the petitioners raise no issue as to the School Districts.

All contentions in support of a petition for a writ of certiorari shall be set out in the body of the petition. Rule 14.2. The failure of a petitioner to present with accuracy, brevity and clarity whatever is essential to ready and adequate understanding of the points requiring consideration is sufficient reason for the Court to deny a petition. Rule 14.4.

Petitioners fail to set forth any contention or point requiring consideration as to the School Districts. The entire petition concerns the alleged duty of the State of Washington to provide special education to the class. Therefore, the Court should deny the petition as to the School Districts.

B. This matter does not merit review as to the School Districts because the Washington State Supreme Court rested its decision as to the School Districts on independent and adequate state grounds.

The Supreme Court will not review judgments of state courts that rest upon independent and adequate state grounds. *Michigan v. Long*, 463 U.S. 1032, 1041, 103 S. Ct. 3469, 77 L. Ed. 2d 1201 (1983). Indeed, if a state judgment rests on independent state grounds, this Court is without power to review the judgment. *Lynum v. Illinois*, 368 U.S. 908, 910, 82 S. Ct. 190, 191, 7 L. Ed. 2d 128 (1961). This Court must accept the rulings of the state court as to those statutes interpreted under that state's constitution. *Metzger v. Parrott*, 233 U.S. 36, 34 S. Ct. 575, 58 L. Ed. 837 (1914).

The Washington State Supreme Court held that neither the Washington State Constitution nor the Washington legislature has placed the duty to provide inmate education on Washington school districts. In Washington, a school district is a creature of the legislature. *Moses Lake Dist. v. Big Bend College*, 81 Wash.2d 551, 556, 503 P.2d 86 (1972). It exists solely for public purposes and may exercise only those powers expressly granted by the legislature, those necessarily implied or incident to the powers granted, and those essential to the legislature's declared purpose. *Id.* A Washington school district has no existence outside of its legislative contours. *Oak Harbor Sch. Dist. v. Oak Harbor Educ. Ass'n*, 86 Wash.2d 497, 500, 545, P.2d 1197 (1976). The organization, administration and operational details of the system of education are the

province of the legislature. *Seattle Sch. Dist. v. State*, 90 Wash.2d 476, 518, 585 P.2d 71 (1978).

However, the State court held that the Washington State Legislature had not imposed on the School Districts the **duty** to provide any mandated educational services to inmates, only the **option** of doing so. If the School Districts declined, the State court held, Washington law provides for other default entities to fulfill any mandates for inmate education. Pet. App. 34-36. This Court must accept the ruling of the Washington State Supreme Court as to its interpretation of Washington State law. *Metzger, supra.*

That is, even if this Court accepted certiorari and determined that federal law mandates that the State of Washington must provide special education in adult correctional facilities for disabled inmates aged 18-21, the Washington State Supreme Court has already determined that Washington law does not place that duty on the School Districts. The decision as to the duty of the School Districts rests on adequate and independent state grounds and this Court should not review that judgment.

As noted above, the petition sets forth no contention that federal law places a direct duty to educate inmates on the School Districts, only that federal law places that duty on the State of Washington. Therefore, the Court should deny the writ.

C. Prior to 1997, federal law did not require the state to provide special education to inmates incarcerated in adult prisons for criminal conduct unrelated to their disability.

The Individuals with Disabilities Education Act, 20 U.S.C. § 1401-1456 ("IDEA"), provides that for a state to receive federal funds it must have a policy "that assures all children with disabilities the right to a free appropriate public education." 20 U.S.C. § 1412(1) (Supp. 1996). Under the IDEA in effect prior to 1997, neither the state nor the school districts were required to provide a free appropriate public education ("FAPE") to juvenile inmates incarcerated in adult prisons. Instead, every circuit court that applied the pre-1997 IDEA held that the right to a FAPE could be forfeited by criminal conduct unrelated to the child's disability. *Doe v. Board of Educ. of Oak Park & River Forest High Sch. Dist. 200*, 115 F.3d 1273 (7th Cir.), *cert. denied*, 118 S. Ct. 564 (1997) (hereinafter "*Oak Park*"); *Virginia Dep't of Educ. v. Riley*, 106 F.3d 559 (4th Cir. 1997); *Doe v. Maher*, 793 F.2d 1470 (9th Cir. 1986), *aff'd on other grounds sub. nom. Honig v. Doe*, 484 U.S. 686 (1988).[1]

In *Riley*, the State sought review of an order by the United States Department of Education ("DOE") withholding $60 million in IDEA funds because the state had failed to provide a FAPE to disabled students who were

---

[1] In support of its argument that the pre-1997 IDEA extended to inmates, Petitioners rely on four district court opinions and one circuit court opinion, *New Hampshire v. Adams*, 159 F.3d 680 (1st Cir. 1998). Pet. Brief at 8. In fact, *Adams* does not discuss this issue.

expelled, and even incarcerated, for criminal behavior. The DOE argued that the IDEA required the state to provide a FAPE to all disabled students, including disabled youths incarcerated for committing felony murder. *Riley*, 106 F.3d at 562.

The Fourth Circuit, sitting *en banc*, rejected that argument and reversed the DOE's order withholding the IDEA funds. The court reasoned that:

> [Section 1412(1) of the IDEA] guarantees that all children with disabilities be provided "the right" to a free public education; this section does not purport to require that every disabled child be provided a free public education regardless of state disciplinary policies governing the provision of educational opportunities to disabled students expelled or suspended for criminal or other serious misconduct wholly unrelated to their disabilities. Since the plain language of IDEA does not, even implicitly, condition the receipt of IDEA funding on the continued provision of educational services to disabled students who are expelled or suspended long-term due to serious misconduct wholly unrelated to their disabilities, the United States Department of Education was without authority to condition the Commonwealth of Virginia's receipt of IDEA funding on the continued provision of free education to such students.

Riley, 106 F.3d at 561. The *Riley* opinion is consistent with the Seventh Circuit's decision in *Oak Park*, and the Ninth Circuit's opinion in *Maher*.

In *Oak Park*, the Seventh Circuit held that the IDEA did not require the school district to continue to provide

educational services to a student who was expelled for reasons unrelated to his disability, and that the student had forfeited his right to a FAPE. *Oak Park*, 115 F.3d at 1275. The court noted:

> [W]hen a handicapped child is properly expelled, the school district may cease providing all education services just as it could in any other case. To do otherwise would amount to asserting that all acts of a handicapped child, both good and bad, are fairly attributable to his handicap. We know that is not so.

Oak Park, 115 F.3d at 1278 (*quoting Doe v. Maher*, 793 F.2d at 1482 and noting that this part of *Maher* was left undisturbed by the Supreme Court on *certiorari* in *Honig*).

Citing *Riley* and *Oak Park*, the Washington Supreme Court held that:

> Based on Congress's failure to even suggest in the IDEA's text, legislative history or purpose that the IDEA applies to children incarcerated in adult facilities, we hold that the pre-1997 amendment version of the IDEA did not require the State provide special educational services to members of the inmate class.

Tunstall v. Bergeson, 141 Wash.2d 201, 229, 5 P.3d 661 (2000); Pet. Brief at 31.

Thus, the Washington State Supreme Court's interpretation of the pre-1997 IDEA is in accord with the Fourth, Seventh, and Ninth Circuits. There is no conflict among the circuits.

D. As currently enacted, the IDEA does not require Washington to provide special education to inmates age 18 and older.

In 1997, the IDEA was amended to provide that:

> A free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school.

20 U.S.C. § 1412(a)(1)(A).[2] The amendments are not retroactive. *See, e.g., Peter v. Wedl*, 155 F.3d 992, 998 (8th Cir. 1998).

In addition, the 1997 Amendments placed two significant limitations on the right to a FAPE:

> (B) Limitation.
>
> The obligation to make a free appropriate public education available to all children with disabilities does not apply with respect to children:
>
> (i) aged 3 through 5 and 18 through 21 in a State to the extent that its application to those children would be inconsistent with State law or practice, or any order of the court, respecting the provision of public education to children in those age ranges; and

---

[2] The 1997 IDEA amendment strengthens the Washington Supreme Court's conclusion that the pre-1997 IDEA did not apply to incarcerated juveniles. *See Amos v. Maryland Dep't of Public Safety and Correctional Services*, 126 F.3d 589, 603 n.8 (4th Cir. 1997) ("Congress' subsequent 'clarification' of the IDEA only validates our conclusion in *Riley*").

> (ii) aged 18 through 21 to the extent that State law does not require that special education and related services under this subchapter be provided to children with disabilities who, in the educational placement prior to their incarceration in an adult correction facility:
>
> > (I) were not actually identified as being a child with a disability under section 1401(3) of this title; or
> >
> > (II) did not have an individualized education program under this subchapter.

20 U.S.C. § 1412(a)(1)(B); *see also* 34 C.F.R. § 300.122.

Prior to the 1997 Amendments, the IDEA stated that the requirement to provide a FAPE did not apply to children aged 18 to 21 when the requirement would be "inconsistent with State law or practice." 20 U.S.C. § 1412(2)(B) (Supp. 1996). In applying this limitation, the Eight Circuit held that there was no obligation to provide related services to a 19-year-old who had graduated from high school, when state law provides that a FAPE terminates upon graduation. *Yankton Sch. Dist. v. Schramm*, 93 F.3d 1369, 1376-77 (8th Cir. 1996); *see also Merrifield v. Lake Central Sch. Corp.*, 770 F. Supp. 468 (N.D. Ind. 1991) (no obligation to provide FAPE to 18- to 21-year-olds when state law terminates right to a free education for non-disabled students at age 18). As the *Tunstall* court noted, the statutory language applied in those cases, namely "inconsistent with State law or practice" is the same limitation found in the current version of IDEA. *Tunstall*, 141 Wn.2d at 229-30; 20 U.S.C. § 1412(a)(1)(B)(i).

Having already decided that state law only required basic education to inmates under the age of 18, the Washington Supreme Court held that "under the amended IDEA, the State is required to provide special education only to juveniles under age 18 as well." *Tunstall*, 141 Wash.2d at 230. Finding that the State was in full compliance with its duty to provide special education to inmates under the age of 18, the court held that the IDEA was not violated. *Id.*

E. Petitioners' interpretation of IDEA would result in absurd consequences.

The Petitioners criticize the Washington Supreme Court's construction of the IDEA, arguing that the limitation found in § 1412(a)(1)(B)(i) (hereafter "subsection (i)") must be subject to the limitation found in § 1412(a)(1)(B)(ii) (hereafter "subsection (ii)"). According to the Petitioners, the state must provide special education and related services to all inmates aged 18 to 21 who were previously identified as disabled, even when doing so would be inconsistent with state law. There are several problems with the Petitioners' argument.

First, the view espoused by the Petitioners would render the limitation in subsection (i) meaningless. Subsection (i) declares that there is no obligation to provide a FAPE to individuals aged 18 to 21 when doing so would be inconsistent with state law or practice. Subsection (ii) states that there is no requirement to provide a FAPE to 18- to 21-year-old inmates when these inmates were not identified as disabled before incarceration, if state law does not require special education to be provided.

According to the Petitioners' view, subsection (ii) contains the only real limitation on the right to a FAPE – only when the inmate is not identified as disabled prior to incarceration and only when State law does not require special education for these unidentified inmates, will a FAPE not be required. This construction effectively renders subsection (i) meaningless for inmates 18- to 21-years-old. Indeed, according to this construction, there would have been no reason for Congress to have included the 18- to 21-year-old age group in subsection (i).

Petitioners contend that relying exclusively on subsection (i) would render subsection (ii) meaningless. Pet. Brief at 15-16. Petitioners are wrong. Under subsection (i), a state's law or practice could require provision of a FAPE to 18- to 21-year-old inmates. In that case, subsection (ii) would limit provision of a FAPE to those inmates who had been identified as disabled prior to incarceration, or who had an individualized education program prior to incarceration.

Second, the construction advocated by the Petitioners would lead to absurd consequences. According to the petitioners, the state would have to provide special education to a disabled 20-year-old inmate previously identified as disabled, even though a non-disabled 20-year-old inmate occupying the same cell would not be entitled to a basic education.

Moreover, special education does not occur in a vacuum. The IDEA does not contemplate "an all-or-nothing educational system in which handicapped children attend either regular or special education." *Daniel R.R. v. State*

Bd. of Educ., 874 F.2d 1036, 1050 (5th Cir. 1989). One of the Congressional policies behind IDEA is to enable disabled children to be educated alongside their non-disabled peers,[3] and disabled students are to be educated in a mainstream classroom whenever possible. *Gill v. Columbia Sch. Dist.*, 217 F.3d 1027, 1034 (8th Cir. 2000) (citing *Board of Educ. v. Rowley*, 458 U.S. 176, 202, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982)). This balance of special and regular education would be impossible in a Washington prison, absent an order requiring the State to create regular education classrooms for inmates aged 18 to 21.

Only by giving subsection (i) equal footing with subsection (ii) will these absurd and incongruous results be avoided. For subsection (i) to have any meaningful significance, it must be read as a separate limitation upon the right to have a FAPE. This is precisely what the Washington Supreme Court did when it held that there is no requirement to provide special education to 18- to 21-year-old inmates, when state law did not require that regular education be provided to these same 18- to 21-year-old inmates. The decision of the Washington Supreme Court must stand.

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[3] Typically, a special education student attends one to two periods a day of special education, and four to five periods of regular education each day. *See* Mark J. Murphy, Note, *Residential Placement of Handicapped Children: Altering the Scope of a Public Education*, 43 U. Pitt. L. Rev. 789, 804 n.80 (1982).

CONCLUSION

For all the foregoing reasons, respondents respectfully request that this Honorable Court deny the Petition.

Respectfully submitted,

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